Saturday, January 10.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

M'GRAW *v.* EDINBURGH STREET TRAMWAYS COMPANY.

Reparation—Servant Acting within Scope of his Employment—Relevancy—Proof before Answer.

A pursuer brought an action of reparation against a tramway company, in which she averred that her son—a boy of twelve—had been invited by a trace-boy to mount the front step of a tram car; that the driver of the car had at first acquiesced, but had thereafter, without warning, lashed her son with a long whip, which by becoming coiled round his neck had jerked him off the car, by which he had been run over and severely injured; and that for the injuries thus caused by the fault of one of their servants acting within the scope of his employment the company were responsible. The defenders pleaded that the pursuer's averments were irrelevant. The Lord Ordinary allowed a proof before answer. The Court *adhered* (*dub.* Lords Young and Trayner, who thought the action was irrelevant as laid against the company).

Mrs Cecilia Gilhooly or M'Graw, 107 High Street, Edinburgh, as tutor of her son Michael M'Graw, aged twelve years, brought an action of damages against the Edinburgh Street Tramways Company for £500 as damages for injuries sustained by her son through the fault of James Bowie, a driver in the employment of the above company.

The pursuer averred that her son had been invited by a trace-boy to mount the front of a tram car and have a ride, and that "the said Michael M'Graw, who is a pupil child, innocently accepted the invitation, and went upon the front portion of the car, which was then quite open and unfenced, and he stood at the left-hand side of the car near the trace-boy and the driver James Bowie. The said James Bowie was in a position to hear, and it is believed did hear, the invitation given to the said Michael M'Graw, and he saw the boy about to go upon the car, but he raised no objection whatever, and the car shortly thereafter proceeded on its journey southwards. At that time the driver held in his hand a very long 'four-in-hand' horse-whip, such as is used by drivers of tram cars with trace-horses, and when the car had proceeded half-way along the North Bridge, the said James Bowie, without a word of warning to the said Michael M'Graw, or any request to him to leave the car, wilfully and culpably lashed the pursuer's said son with the long horse-whip with such force and in such a manner that the leash or thong was coiled several times firmly round the boy's neck, and the said Michael M'Graw was almost strangled and rendered powerless. The said James Bowie, while the car, with four horses attached, was running at a rapid pace, then jerked the whip several times in such a way as to throw the said Michael M'Graw violently from the car while it was in motion, and the leash or thong meanwhile remaining firmly coiled round his neck, the pursuer's said son was was thrown from the car, and was dragged in front of the wheel and run over. As the car proceeded for some distance before stopping, the whip ultimately went also to the ground. . . . "In consequence of said occurrence the said Michael M'Graw sustained very serious injuries, and had to be conveyed to the Edinburgh Royal Infirmary, where his life was for some time despaired of. His left leg was almost severed from the body, and has had to be amputated. . . . It was grossly culpable on the part of the said James Bowie to adopt the mode and means which he did, as before condescended on, to remove the said Michael M'Graw from the car while it was in motion, and said conduct of the said James Bowie was unnecessarily cruel and dangerous to the said Michael M'Graw, and it was besides quite uncalled for. . . . The injuries to the said Michael M'Graw were occasioned by the fault of the said James Bowie, the defenders' servant, while acting on their employment and instructions, as before condescended on, and for this fault of his the defenders are responsible."

The defenders denied that the boy had been struck by the driver, or injured through his fault as alleged, and explained at great length that the injuries were entirely the result of the boy's own fault, that he was a trespasser on the car, and that the driver was bound to prevent such trespassing.

They pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons."

The Lord Ordinary (KINCAIRNEY) allowed a proof before answer.

"*Opinion.*—The pursuer has lodged an issue in ordinary terms. The defenders took no exception to it, but submitted that the facts should be investigated by proof before answer, and not by trial before a jury. They have pleaded on record that the pursuer's averments are irrelevant. They did not waive that plea, but did not insist that the action should be decided on that plea without inquiry. They were willing that there should be a proof before answer. I think that the method of inquiry suggested by the defenders is the more expedient. There are questions of law involved, one of them of apparently considerable nicety, and I think there would be considerable danger of miscarriage before a jury.

"The defenders have pleaded that the pursuer cannot recover because he was a trespasser, and because he contributed, by his own fault or negligence, to cause the injury he received. It is these pleas which raise any serious difficulty. For, supposing the boy was a trespasser, which probably he was, that could not possibly excuse the assault averred in condescendence 3, and

if these averments are true, it is plainly impossible that there could be any contributory negligence.

"But condescendence 3 seems to raise a question, which may be a question of difficulty, in regard to the responsibility of the defenders for what James Bowie, the conductor of the tramway car, is said to have done; and on account of that question I think it possible that there might be a miscarriage before a jury, either on account of misdirection by the Judge, or misapprehension by the jury. I think there is in that part of the case sufficient special cause to warrant me, under section 4 of the Act of 1866, in directing a proof.

"I could not have approved of the issue without tacitly affirming the relevancy of the averments. I am not prepared to do so, and I am not bound to decide that the averments are irrelevant because the defenders have not asked me to do so, and because by allowing a proof before answer I reserve that question.

"The pursuer's averments are really very remarkable. As I have indicated, I do not expect that the question whether this boy was a trespasser or no will be found of much consequence. But in condescendence 3 there is a minute and detailed averment of an outrageous and what seems to be an impossible assault committed by the conductor. There is no more said in this than that the conductor, finding the boy on the tramway car, assaulted him as alleged. There is no suggestion of accident, want of skill, or negligence, nothing but bare assault without any motive or object. At the close of condescendence 4 it is averred that the injuries to the boy were occasioned by the fault of Bowie, the defenders' servant, while acting on their employment and instructions. But that is saying no more than that the conductor of a tramway car while conducting it committed an assault. If that were all, there could, I think, be little difficulty in holding the averments irrelevant. But there is a statement in condescendence 4 which creates some difficulty. It is said 'it was grossly culpable on the part of the said James Bowie to adopt the mode and means which he did, as before condescended on, to remove the said Michael M'Graw from the car.' The meaning of that seems to be that the assault averred in condescendence 3 was the conductor's mode of putting the boy off the car, namely, by coiling his whip tightly round the boy's neck, and jerking him violently from the car while it was in rapid motion.

"I am bound to assume the truth of the pursuer's averments, and if they are proved the question will be whether the defenders are responsible for this eccentric and very adroit mode of ejection. It is possible that this question of law may depend on delicate distinctions in fact which a jury may not be well qualified to take. I quite recognise that the question will not be whether the defenders authorised the particular act, but whether it can be fairly said that it was done in the ordinary course of the conductor's service—*Seymour* v. *Greenwood*, January 22, 1661, 30 L.J., Exch. Div. 189. But I rather think it will be safer to decide this question after a proof than on the mere relevancy, and much safer to decide it after a proof before the Lord Ordinary than by the verdict of a jury.

"The pursuer referred to *Fraser* v. *Younger & Sons*, June 13, 1867, 5 Macph. 861; Fraser on Master and Servant, pp. 272-273, and the cases there quoted; and the defenders referred especially to *Wardrope* v. *Duke of Hamilton*, June 24, 1876, 3 R. 876. Reference may also be made to *M'Laren* v. *Rae*, December 10, 1827, 4 Murray, 384, and to Mauley Smith's Master and Servant, pp. 328-344. There is a very recent case, *Abrahams* v. *Deaken*, November 28, 1890, 7 Times' Law Reports, 117, to which, although not exactly in point, it may be worth while to refer."

The pursuer reclaimed, and argued—That the issue should be approved, and the case tried before a jury. The case was relevantly brought against the company. The driver was the servant of the company. If he had carried out his duty of removing this boy from the car in a harsh, reckless, and cruel manner the company were responsible. He was acting within the scope of his employment—*Limpus* v. *London General Omnibus Company, Limited*, June 25, 1862, 32 L.J., Exch. 34; *Bayley* v. *Manchester, Sheffield, and Lincolnshire Railway Company*, Feb. 10, 1873, L.R., 8 C.P. 148; *Mackay* v. *Commercial Bank of New Brunswick*, March 14, 1874, L.R., 5 P.C. App. 394; *Bank of New South Wales* v. *Owston*, March 28, 1879, L.R., 4 App. Cases, 270.

Counsel for the respondent was not called upon.

At advising—

LORD JUSTICE-CLERK—I agree with the view of the Lord Ordinary. I think he has dealt with this case in the proper way. It might be quite possible to throw out this case as irrelevant upon the statements of the pursuer although a relevant case could be stated, but I am of opinion that the case is one in which the discretion of the Lord Ordinary in allowing a proof before disposing of the relevancy was well exercised.

LORD YOUNG—I am not unwilling to adopt that course although my impression is that this action is irrelevant. There may be a good statement to support an action of damages for assault against the man who is alleged to have committed the assault, but I think if the action as laid against the Tramway Company had been met by a simple denial of responsibility, the only possible course would have been to find the action irrelevant. The action has, however, been presented by the defenders here as raising a question as to the mode in which this little trespassing boy was put off the car by the company's servants. In these circumstances I concur in thinking a proof should be allowed before answer.

LORD RUTHERFURD CLARK—I think the safest course we can pursue is to affirm the interlocutor of the Lord Ordinary.

LORD TRAYNER—I am of opinion that the action is irrelevant, but like Lord Young I am unwilling to go the full length of giving effect to that view. I think the Lord Ordinary acted wisely, and that we should affirm the course he has adopted, which is certainly the most favourable possible to the pursuer.

The Court adhered.

Counsel for the Pursuer and Respondent —Young — A. S. D. Thomson. Agents— Henry Wakelin & Hamilton, S.S.C.

Counsel for the Defenders and Reclaimers —Lorimer. Agent—George Inglis, S.S.C.

Wednesday, January 7.

FIRST DIVISION.

[Lord Trayner, Ordinary.

SWANSON *v.* GRIEVE AND OTHERS.

(*Ante*, July 11, 1890, 27 S.L.R. 884; 17 R. 1115.)

Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29)—*Enlargement of Holdings—Entry to Assigned Lands—Bona fide Possession.*

In April 1889, by order of the Crofters Commissioners, certain lands—being part of a farm held under a lease dated subsequent to the passing of the Crofters Act 1886 — were assigned to certain crofters for the enlargement of their holdings. The landlord and tenant of the farm thereafter brought a suspension and interdict to have the crofters interdicted from entering upon the assigned lands, on the ground that they had no title, as they had not obtained from the Sheriff, in terms of the Act, a decree-conform to the order of the Commissioners. After certain procedure the Sheriff pronounced decree-conform on 3rd March 1890, and the interim interdict which had been granted was recalled. The landlord and tenant then brought a second note of suspension and interdict seeking to have the crofters interdicted from entering on the assigned lands, on the ground that the Commissioners had gone beyond their powers in making the order in question, the lands assigned being part of a farm held under a lease. In July 1890 the reasons for suspension were repelled, but in the meantime the tenant had sown the assigned lands with seed for crop 1890. To this crop the crofters claimed right, and they obtained decree of ejection against the tenant.

In a suspension by the tenant—*held* that the complainer having sold the crop in *bona fides*, had exclusive right thereto, and was only bound to cede possession of the subjects under reservation of that right.

Held by Lord Trayner (Ordinary), that the crofters not being proprietors of the land, could have no claim for a crop which they had neither sowed nor worked, though they might have a claim for damages for being kept wrongously out of possession.

Observations by the Lord President and Lord Adam to same effect.

This is a sequel to the case of *Traill's Trustees* v. *Grieve*, reported *ante*, July 11, 1890, 27 S.L.R. 884, and 17 R. 1115.

By order dated 24th April 1889 the Crofters Commissioners assigned certain subjects amounting to 65 acres arable land and 22 acres pasture to John Grieve and others, crofters, in enlargement of their holdings, with possession at 11th November following. The land assigned formed part of the farm of Elsness, Orkney, then occupied by Mr James Swanson as agricultural tenant of the proprietors, the trustees of Mr Traill of Rattar. In November following the proprietors and tenant brought a suspension and interdict in order to have the crofters prevented from taking possession, on the ground that decree-conform had not been obtained from the Sheriff under the 28th section of the Crofters Holdings Act 1886. Interim interdict was granted, but on 3rd March 1890 decree-conform was pronounced by the Sheriff, and thereafter the interim interdict was recalled.

On 13th March 1890 the proprietors and tenant presented a second note of suspension and interdict, praying the Court to suspend the order of the Commissioners and the decree following upon it, on the ground that the Commissioners had acted *ultra vires* in pronouncing the order in question. The note was refused by the Lord Ordinary (TRAYNER), and the complainers having reclaimed, the First Division adhered to the Lord Ordinary's decision on 11th July 1890—*ante*, vol. xxvii. p. 884, and 17 R. 1115.

In the meantime the tenant Mr Swanson had sown the necessary seed for crop 1890 on his farm, including the lands assigned to the crofters. The crops so sown on the assigned lands amounted to 14 acres of bere, 3 acres of potatoes, and 16 acres of turnips.

On 25th July 1890 the crofters—John Grieve and others—raised an action against Swanson in the Sheriff Court at Kirkwall for warrant to eject him from the assigned lands. Decree of ejection was granted on 2nd August 1890 by the Sheriff-Substitute (ARMOUR), and the defender having appealed, the Sheriff (THOMS) on 26th August adhered to the interlocutor of the Sheriff-Substitute.

On 4th September Swanson, in order to preserve his right to the crops sown by him, presented this note of suspension, praying the Court to suspend the ejection with which he was threatened by John Grieve and the other crofters, and the whole grounds thereof.

The complainer stated that he did not dispute that the respondents were entitled to get possession of the assigned land, but maintained that the decree of ejection