Wednesday, March 23.

FIRST DIVISION.

[Lord President and a Jury.

M'CAFFERY *v.* LANARKSHIRE TRAMWAYS COMPANY.

Process—Jury Trial—Reparation—Withdrawal of Case from Jury on Ground of Failure to Lead Evidence of Fault.

Circumstances in which the Lord President withdrew from the jury, on the ground that no evidence had been led upon which a verdict could be returned for the pursuer, a case which had gone to trial.

Dictum of Lord Young in *Gibson* v. *Nimmo & Co.*, March 15, 1895, 22 R. 491, at 499, 32 S.L.R. 411, at 414, *disapproved.*

On 31st December 1909 Thomas M'Caffery, miner, Blantyre, as tutor and administrator-in-law for his pupil child Teresa M'Caffery, aged six, brought an action of damages against the Lanarkshire Tramways Company, Motherwell, in which he claimed £500 in respect of injuries sustained by her through being run over by an electric tram car belonging to the defenders.

The parties averred—"(Cond. 2) On or about 15th November 1909, about 4 p.m., pursuer's said pupil child was crossing Glasgow Road, Blantyre, on her way from school when she was suddenly and without warning knocked down and run over by an electric tram car belonging to defenders and driven by one of their servants, for whom they are responsible, and received serious injuries as after mentioned. The car was at the time travelling eastward upon the line from Cambuslang to Hamilton. The statements in the answer are denied. (Ans. 2) Admitted that on the date referred to, in Glasgow Road, the pursuer's child was, in the circumstances after mentioned, injured by a car belonging to the defenders and driven by one of their servants. *Quoad ultra* denied. Explained that just as the car was approaching, the pursuer's daughter suddenly rushed out from between a heap of pitch on the highway and a tar boiler which was standing on the south side of the said road, and attempted to cross the road. The defenders' driver directly he saw her appear did all in his power to stop the car and to prevent an accident, but owing to the child's sudden appearance as aforesaid he was unable to prevent the car from coming in contact with her. The sad accident was caused by, or at anyrate was materially contributed to by, the child's own fault. Alternatively the pursuer was in fault in allowing a child of tender years to wander unattended on the road in question, and the accident resulted from his said fault. . . . . .

(Cond. 4) Said accident was due to the fault and negligence of defenders' servant, the driver of said car, for whom defenders are responsible. At the time of the accident the driver was driving the car at an excessive rate of speed, and in a careless and reckless manner, and without keeping a proper look-out in front of him, or giving any warning to pursuer's said child of his approach. If the defenders' said driver had been keeping a proper look-out in front of him he would have seen the said Teresa M'Caffery, and been able to give her warning by ringing the bell or shouting, and to pull up in time to avoid knocking her down. Further, if the said driver, when he saw the child, had been driving at a proper and moderate speed, and had had the car under control, he would have been able to stop the car in time to avoid the accident. It is believed and averred that when the said driver did perceive the danger of the car running down the child he negligently failed to take proper precautions to prevent the accident by ringing the bell and braking the car in an adequate way, and thus caused said accident, for which defenders are responsible. (Ans. 4) Denied. Explained that the motorman had rung his gong while approaching the tar boiler, and had also the car under his immediate control. Reference is made to answer. 2."

The Lord Ordinary (MACKENZIE) having allowed an issue in ordinary form the case was tried before the Lord President and a jury on 23rd March 1910. At the conclusion of the pursuer's evidence (the import of which sufficiently appears from his Lordship's opinion, *infra*), counsel for the defenders asked his Lordship to withdraw the case from the jury on the ground that no evidence of fault on the part of the defenders or their servant had been led. He cited *Flood* v. *The Caledonian Railway Co.*, November 30, 1889, 27 S.L.R. 127; and *Tully* v. *North British Railway Co.*, July 17, 1907, 46 S.L.R. 715.

Counsel for the pursuer objected, and argued (1) that he had led evidence sufficient to support a verdict in his favour should such a verdict be returned, and (2) that the course proposed was incompetent. In support of his second contention he referred to *Gibson* v. *Nimmo & Co.*, March 15, 1895, 22 R. 491, *per* Lord Young at p. 499, 32 S.L.R. 411, at p. 414.

LORD PRESIDENT—This is one of the very rare cases where a judge is asked at the close of the pursuer's evidence to withdraw the case from the jury because there has been no evidence led upon which they could be asked to return a verdict in favour of the pursuer; but I have no doubt whatsoever that it is a case where it is my duty to do so. The grounds upon which the pursuer's counsel says he was entitled to get a verdict if the jury consider his evidence sufficient are three in number. In the first place, he says there was a failure on the part of the driver, for whom of course the defenders are responsible, to keep a proper look-out. Upon that matter there has been no evidence led whatsoever. The only evidence that has been led was that on a straight road upon a November night

at five o'clock it was possible to look down that straight road and see persons for 150 yards distant. But that was not proving that there was not a proper look-out kept, and for the very good reason that none of them knew that the poor little child was in the road when this car was approaching. Indeed the strong probability upon the evidence is that she was not, but that she was in behind the tar boiler or the lumps of pitch, and a little mite like that does not need very much to prevent her being seen.

The second ground is that no proper warning by bell or gong was given. But it is no part of the duty of a driver to keep ringing his gong. He has got to ring the gong when he sees some obstruction or person to be moved out of the way. But if there was no evidence, as there was none here, that there was any person in the way, there was no wrong in the driver not having sounded his gong.

Then it was said that the speed was excessive. On that we have no evidence. The only speed spoken to was, in epithets, that the car was going a pretty good rate, and, in figures, 12 to 15 miles an hour. Neither of these speeds was *per se* excessive, and more than that, the people who said so all agreed that at the time of the accident nobody even suggested that the speed was excessive.

Therefore upon all the three points I find that there has been no evidence led whatsoever, and I think it is my duty to withdraw the case from the jury. As regards the dictum of Lord Young that was quoted by counsel, I have no hesitation in saying that that was not law, and I am not bound by it. If the learned counsel thinks that Lord Young's opinion was right he can take exception to the course now being followed and see what fate it will have before another tribunal. I will therefore direct the jury to return a verdict for the defenders.

The jury returned a formal verdict for the defenders.

Counsel for the Pursuers—Crabb Watt, K.C.—Jameson. Agents—Marr & Sutherland, S.S.C.

Counsel fer the Defenders — Hunter, K.C.—Munro. Agents—Patrick & James, S.S.C.

Tuesday, June 14.

FIRST DIVISION.

[Sheriff of Fife.

KIRKCALDY MAGISTRATES *v.* EARL OF ROSSLYN'S TRUSTEES.

Burgh—Street—Petition for Warrant to Lay out Street—Conditions—Avoidance of Cul-de-Sac—Right of Town Council to Refuse Petition de plano—Burgh Police (Scotland) Act 1903 (3 *Edw. VII, cap.* 33), *sec.* 12.

The Burgh Police (Scotland) Act 1903 enacts—section 12—"Any person presenting a petition to the town council for warrant to form or lay out any new street shall fulfil any conditions which the town council may, by the warrant granting the petition, impose with regard to the following matters, viz. (1) the avoidance of a cul-de-sac. . . ."

Owners of ground within burgh applied to the town council in terms of section 11 of the Burgh Police (Scotland) Act 1903 for authority to lay out a new street. The street as shown on the plans ended in a cul-de-sac owing to its having been carried up to the extreme limit of the petitioners' property.

Held that the town council were not entitled to refuse the application *de plano*, their power under section 12 of the Act being only to impose conditions.

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), section 12, is quoted *supra in rubric.*

On 8th April 1909, R. C. De Grey Vyner, of Fairfield, Yorks, and others, trustees of the Right Hon. the Earl of Rosslyn, presented an application to the Town Council of Kirkcaldy, in terms of section 11 of the Burgh Police (Scotland) Act 1903, for authority to lay out a new street on part of their property within the burgh. The Town Council having declined to sanction the proposed street, on the ground that, as shown on the plans, it ended in a cul-de-sac, the petitioners appealed, under section 339 of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict., cap. 55), to the Sheriff-Substitute (SHENNAN), who on 18th October 1909 pronounced this interlocutor:—"Sustains the appeal: Finds that the respondents were not warranted in refusing to sanction the street referred to in the appeal merely on the ground that it would form a cul-de-sac: With this finding remits to the respondents to consider of new the petition of the appellants," &c.

The Town Council appealed to the Sheriff (MACFARLANE), who on 9th December 1909 adhered.

Note.—"The Town Council maintained that section 12 is to be read as giving them a power to impose on a petitioner a condition that the proposed street shall not terminate in a cul-de-sac, under certification that if the petitioner does not