slight extrinsic inquiry would have shown that the charge was unfounded. In this case, however, the defender was acting on the evidence of his own senses, and there was no possibility of any extrinsic evidence. The explanation of the pursuers, which presumably would have been on the lines of their averments on record, might well have failed to carry conviction to the defender's mind, and was at all events such an explanation as he might honestly disbelieve. In these circumstances I think the pursuers have failed to make a relevant allegation of malice, and that accordingly we ought to dismiss the action. The only consolation that can be afforded the pursuers is, that as the defender has not asked an issue of justification it must be assumed that the charge is untrue and it cannot therefore be repeated by others without their exposing themselves to an action of damages for defamation.

LORD GUTHRIE—I have had an opportunity of reading Lord Dundas's opinion, and I concur in it.

The Court recalled the interlocutors of the Lord Ordinary and dismissed the actions.

Counsel for the Pursuers (Respondents)—Anderson, K.C.—D. Jamieson. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the Defender (Reclaimer)—Dean of Faculty (Clyde, K.C.)—Watt, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Saturday, October 21.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

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

Reparation — Negligence — Road — Horses and Vehicles—Duty of the Driver of a Vehicle towards a Dog.

An action of damages for pecuniary loss was raised on the ground that a dog belonging to the pursuer was, while making stool by the side of the road close to the pursuer, run over by a lorry driven by the defenders' servant. It was averred that the driver was not keeping a good look-out. *Held* that the averments were relevant, and proof *allowed.*

James Graham, *pursuer*, brought an action in the Sheriff Court at Edinburgh against the Edinburgh and District Tramways Company, Limited, *defenders*, to recover £90 as loss and damage arising through a prize-bred Highland terrier bitch named "Betty" having been run over at the side of the road by a motor-lorry belonging to the defenders and driven by one of their servants, being £75 for the bitch and £5 each for three pups.

The pursuer averred—"(Cond. 2) On Friday, 30th October 1914, at or about 9·45 p.m., a white West Highland terrier bitch named 'Betty,' aged one year and seven weeks or thereby, and belonging to the pursuer, was in the act of making stool on the north side of the roadway of Grange Loan, Edinburgh, and near the pursuer's dwelling-house, when she was knocked down and run over by a motor-lorry, numbered S. 1492, No. 2, belonging to the defenders, and driven at the time of the accident by one of the defenders' servants in the course of his employment with the defenders. The near or left-hand wheels of the said lorry passed over the body of the said terrier, and she was thus instantaneously killed. (Cond. 3) The said accident occurred through and was entirely due to the fault and negligence of the defenders' said servant. On the occasion in question he was driving the said lorry westwards along Grange Loan at an excessive speed and on the north side of the roadway, on which side he had no occasion to be and ought not to have been. The width of the roadway of Grange Loan is 27 feet 6 inches or thereby, and there was nothing to prevent him from driving the said lorry (which was 5 feet or thereby in width) on the south side of the roadway, on which side he ought to have been. Further, he failed to give any warning of his approach and he failed to keep a proper look-out and to have the said lorry properly lighted. At and immediately prior to the time of the said accident the only light at the front or sides of the said lorry was a small lamp at the front of the right-hand side thereof. That light was inadequate to enable any person or animal to ascertain the whereabouts or breadth of the said lorry, and the pursuer, who was standing near his said terrier, could not, owing to the said inadequate lighting, ascertain the whereabouts or breadth of the said lorry until it was so close beside him and the said terrier that he could not save her, although he had been keeping a proper look-out. The said terrier was also keeping a proper look-out, but it was impossible owing to the said inadequate lighting for the said terrier to ascertain the whereabouts or breadth of the said lorry. Had the said driver driven the said lorry on the south side of the roadway, the said accident would not have happened. Had the said driver given any warning of his approach by sounding a horn or otherwise as it was his duty to do, and had he been driving at a moderate speed as he ought to have done, the said accident would have been avoided by the said terrier leaving the roadway, but owing to the said failure to give warning and to the said excessive speed there was no opportunity for the said terrier to escape the said lorry. Further, had the said driver been keeping a proper look-out, which it was his duty to do, he would have seen the said terrier in time to avoid the accident, and could have avoided it by drawing up in a reasonable distance or drawing to the side had he been driving at a moderate speed. The place of the accident was lighted at the time by a street lamp, and the said white terrier was plainly visible against the surface of the roadway, which was of dark material. It is believed and averred that on the occasion

in question the said driver had driven the said lorry at an excessive speed down the steep incline of Causewayside, Edinburgh, and without giving warning had swerved the said lorry rapidly and recklessly round the sharp corner at the junction between Causewayside and Grange Loan on the north side of Grange Loan, at a distance of 49 yards or thereby eastwards from the place of the accident, and that consequently the speed of the said lorry was so excessive that he had no control thereof in Grange Loan. On either side of Grange Loan, between said corner and the place of the accident and for some distance further westwards, there is a row of densely-populated tenements, and the part of Grange Loan in question is a thoroughfare on which, as the said driver knew, or ought to have known, persons and animals were likely to be, and accordingly it was the duty of the said driver to round the said corner with caution and to give warning of his approach. Further, it was his duty to keep clear of the said terrier, and the accident was caused by his fault and negligence in driving at an excessive speed and on the wrong side of the roadway, and in failing in his duties to keep a look-out and give warning of his approach, and to have the said lorry properly lighted and keep clear of the said terrier and observe the pursuer's warning as after mentioned. (Cond. 4) The said terrier was intelligent and accustomed to keep clear and would have kept clear of traffic driven with ordinary care and approaching after due warning. On the occasion in question, the pursuer took every reasonable precaution for the safety of the said terrier by standing near her and in readiness to remove her from the roadway if she did not go of her own accord out of danger from oncoming traffic on due warning being given of its approach, but owing to the fault and negligence of the said driver as condescended on, the pursuer had no opportunity to save the said terrier. Prior to the accident the pursuer observed that the said driver was not keeping a look-out and the pursuer shouted to the said driver to look-out where he was going, but the said driver paid no attention to the pursuer's warning and continued to drive the said lorry at an excessive speed. . . ."

The pursuer pleaded—"1. The pursuer having sustained loss and damage through the fault and negligence of the defenders, as condescended on, is entitled to reparation therefor."

The defenders pleaded—"1. The action is irrelevant."

On 15th July 1915 the Sheriff-Substitute (GUY), after hearing parties in the debate roll, dismissed the action as irrelevant.

Note.—"The pursuer is owner of a West Highland terrier bitch named Betty. He resides at 9 Grange Loan, Edinburgh, and on 30th October 1914, at about 9·45 p.m., he took the dog out from his house for necessary purposes; at all events, I assume that from his averments, as he says that at that time it was with him on the north side of the roadway in Grange Loan in the act of making stool. I pause for a moment to say that I do not think that that is what our streets or roads were intended for. It may be for the convenience of the owner of a dog to take it out to the public street at night in order that it may do those things that it is necessary for dogs to do, and which it is inconvenient to the owner that they should do within their houses. But I think that that is for the owner's convenience only, and that the streets and roads were not constructed for that purpose. They were constructed for animals of passage, vehicles of passage, and persons of passage. It may be that dogs are allowed to be upon the streets and roads by way of sufferance. But the streets and roads were not made for them. The pursuer avers that the defenders' servant, who was driving a motor lorry belonging to them, ran down his dog while it was making its stool. I would be prepared to sustain the relevancy of a case of this kind, even supposing the dog had no right to be upon the road at all, if it were averred that the driver deliberately ran it down. I would do this in the same way as if the defenders' servant had deliberately run over a bag that had accidentally fallen off a cab. No person is entitled to deliberately do damage to another person's property, even though that property is where it ought not to be or has no right to be. But the pursuer here has not made any averment that the driver saw the dog, and at the debate I asked his counsel whether he could make this averment, and the answer was that he could not. He must therefore rely upon the right of the dog to be there, and the duty of the driver to see it. In my view it would only be possible to make a relevant case by averring that the dog was in the position alleged losing for the time its usual mobile activity. One has often seen dogs, with an apparent dislike of wheels, careering round motors and other vehicles, but no one would ever say that it was the duty of a driver in these circumstances to pull up. Progress on the streets would become impossible if this duty were to be imposed on drivers. The pursuer in the present case, no doubt knowing that his dog could not take care of itself at the moment, says that he called out to the driver to look out where he was going. He would require to go on to show that the driver heard him and understood him, and refused to comply with his warning. A driver is not bound to stop whenever any one shouts on the street. The shout is only a warning that his attention may be drawn to something which he should avoid. I rather am of the opinion that it was the pursuer's duty as the owner of the dog, when he saw danger, to remove the dog instead of shouting to somebody else to save his property. If it had been his bag that was lying on the street, and he had shouted to the driver to look out, I do not think that the driver would have been under any duty in the matter to obey his call, unless, of course, he saw the bag in time to draw up. But I am not dealing with a case of that kind. I am dealing with the case of a dog which in ordinary circum-

stances is a nimble animal, and is or ought to be able to avoid vehicles. If a driver is not bound to draw up his motor for a dog that he sees, he is not bound to do so for a dog that he does not see. The case for the pursuer must be narrowed down to the point that the driver ought to have seen the dog. I am unable to come to the conclusion that he ought to have seen a West Highland terrier bitch making its stool in the roadway in Grange Loan on 30th October 1914 at 9·45 p.m., and it is upon this point that I do not think any proof can help me. I am therefore dismissing the case as irrelevant without involving both parties, if they accept my judgment, in the expense of a proof—in other words, I do not see how a proof can make me come to any other conclusion than that I have now come to. I have, of course, not kept out of view the pursuer's averments as to the insufficient lighting of the motor lorry and the breadth of it, the intelligence of the dog, and whether the dog could judge of the sufficiency of the lighting and the breadth of the lorry. Nor am I ignoring the averment that at the time the dog was run over the motor was on a particular part of the roadway where he had no right to be. Rule of the road only exists in relation to passenger or vehicular traffic, and does not apply to dogs, whatever may be their position or condition."

The pursuer appealed, and argued—The Sheriff-Substitute had gone wrong and a proof should have been allowed. A relevant case had been tabled. If there was no duty on the driver of the lorry to keep to his right side of the road in respect of dogs, still he was bound to go at a reasonable speed. Here his speed was excessive. The driver also had failed to keep a good look-out, which it was his duty to do. The dog had a right to make stool on a road, but even if it had not still the driver of the lorry had no right to run it down. The proximate cause of the accident was the failure of the driver to keep a good look-out, and the pursuer was entitled to recover even if the bitch were illegally there, if the defenders' negligence were such that its consequences could not be avoided by ordinary care—*Davies* v. *Mann*, 1842, 10 M. & W. 546. The nimbleness of a dog might be a good defence against an averment of negligence in running down a dog, but if there were on account of its nimbleness a presumption against negligence, that presumption could be displaced—Glegg on Reparation, 2nd ed., p. 391.

Argued for defenders—An entirely new point was raised here. The use of the road by the dog in this case was an unlawful use. Previous cases all dealt with animals that were using the road as a means of passage. Here the duty of the owner was to put the dog in his back green. The ordinary duties of a driver flew off in respect of dogs and animals where they were using the road for an illegal purpose. In any event it was the duty of the pursuer to have had his dog on leash and to have pulled it away from the oncoming lorry. No relevant case had been made out, and the judgment of the Sheriff-Substitute should not be disturbed.

At advising—

LORD JUSTICE-CLERK—I sympathise a good deal with some of the views that the Sheriff-Substitute has expressed, but I think he has gone too fast. I do not think it can be maintained that injury to a dog, causing loss to the dog's owner, is not a good legal ground for damages. I am inclined to agree with what the Sheriff-Substitute says—"The case for the pursuer has been narrowed down to the point that the driver ought to have seen the dog." If that be so, then the only substantial ground of fault would be that the driver really had failed to keep a proper look-out, for if he had kept a proper look-out he would have seen the dog and the accident could not have occurred.

But the Sheriff-Substitute goes on to say—"I am unable to come to the conclusion that he ought to have seen a West Highland terrier bitch making its stool in the roadway in Grange Loan on 30th October 1914 at 9·45 p.m., and it is upon this point that I do not think any proof can help me." I cannot agree with that view. It seems to me that it is impossible for any judge to say—when there is no proof before him at all—what amount of proof the pursuers may be able to bring and what the effect of that might be upon his mind.

I have therefore come to the conclusion—I confess with regret—that we must recal the Sheriff-Substitute's interlocutor and remit to him to take a proof in the case.

LORD DUNDAS—I agree with your Lordship entirely. While I cannot help thinking that the pursuer's case does not look a particularly hopeful one, yet I must say the learned Sheriff-Substitute has in my judgment gone rather too fast. He says that the pursuer does not aver anywhere that the driver saw the dog, and that in answer to a question the pursuer's representative had candidly admitted that he could not make that averment. The Sheriff-Substitute seems to think that is conclusive, but I do not think it meets the averment which the pursuer makes when he says—"Had the said driver been keeping a proper look-out, which it was his duty to do, he would have seen the said terrier in time to avoid the accident." As your Lordship points out the crux of the case is reached when the learned judge says that the case for the pursuer must be narrowed down to the point that the driver ought to have seen the dog, and then says that no amount of evidence will help him upon that point. I think the question is one of fact and must be inquired into. That is sufficient ground for sustaining this appeal. Like your Lordship I feel some regret in doing so.

LORD SALVESEN—I agree. I think the law of the case is well settled by the case of *Davies* v. *Mann*, (1842) 10 M. & W. 546. I confess I can see great difficulties in the pursuer's way in establishing negligence, but I think he has relevantly averred it.

LORD GUTHRIE — I agree. The Sheriff-Substitute holds that there can be no liability in the case of a dog injured by a vehicle on the roadway unless the driver deliberately ran the dog down. The Solicitor-General did not maintain that proposition, but said that while in the case of a dog which was on the road for the purpose of passage that law would not be sound, yet it was sound in a case where, as here, the dog was on the road for another purpose altogether. As I read the record of the pursuer he makes no averment excluding the case in which the Solicitor-General admits there would be liability.

The Court recalled the interlocutor of the Sheriff-Substitute and remitted to him to allow a proof.

Counsel for the Pursuer (Appellant) — Horne, K.C.—Scott. Agent—T. E. Gilbert Taylor, Solicitor.

Counsel for the Defenders (Respondents)—Solicitor-General (Morison, K.C.) — W. J. Robertson. Agents—Macpherson & Mackay, W.S.

Friday, November 3.

SECOND DIVISION.

[Sheriff Court at Glasgow.

LANARKSHIRE COUNTY COUNCIL *v.* MILLER.

Local Government — Rates — Assessment — County Council — Maills and Duties — Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 105—*Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 42—*Liability for County Rates of Heritable Creditor not Entered in either Assessment Roll or Valuation Roll, but Ingathering the Rents.*

The Local Government (Scotland) Act 1889, sec. 105, enacts—"The expression 'owner' has the same meaning as the expression 'proprietor' has in the Valuation Acts." The Valuation of Lands (Scotland) Act 1854, sec. 42, enacts that "the term 'proprietor' shall apply to liferenters as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages." In an action by a county council to recover the rates payable in respect of certain properties for two bygone years, *held* that a creditor of the owner of the properties, though he had ingathered the rents under a decree of maills and duties, was not liable for the rates, as his name did not appear as owner or proprietor in either the valuation roll or in the assessment roll, and case *dismissed.*

The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 105, and the Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 42, are quoted *supra in rubric.*

In November 1914 the County Council of the County of Lanark, *pursuers*, brought an action against Peter Lindsay Miller, writer, Glasgow, *defender*, to recover £79, 14s. 8d., being the rates payable in respect of certain lands and heritages at Omoa Square in the parish of Shotts and county of Lanark for the years 1911-12, 1912-13.

The following *narrative* is taken from the opinion of the Lord Justice-Clerk :—"In this case the County Council of the County of Lanark sue the defender for the rates payable by the owner or proprietor of certain houses for the year 1911-12, and for the rates payable by the owner or proprietor and by the occupier for certain houses for the year 1912-13. John Agnew was owner and proprietor of these houses for the years in question, but the defender, it is averred, was heritable creditor in possession of the houses from October 1910 till after 15th May 1913 under a decree of maills and duties, and actually received the rents for the period from 15th May 1911 to 15th May 1913. Mr Agnew was entered as owner or proprietor both on the valuation rolls and the assessment rolls for the period in question, the defender's name never appearing on any of the rolls. The returns from which the entries in the valuation roll were made, 'in which John Agnew was erroneously entered as proprietor,' it is averred were made by the defender's firm. It is not averred that in making the returns the firm was acting as agents for the defender and not as agents for John Agnew, or that the returns were not honestly made. There are no provisions in the Act of 1889 or in any of the statutes therein referred to for making up an assessment roll, but it is plain from sections 64 and 65 of the 1889 Act that it was the duty of the pursuers to make up such a roll, and they have accordingly always done so on the basis of the valuation roll, and on these rolls Agnew's name always appeared as owner or proprietor, and the defender's name never appeared. The pursuers took out summary warrants against Agnew for the rates in question, and in his sequestration they lodged a claim therefor. He had, however, no estate, and therefore nothing was recovered by the pursuers. The valuation rolls and the assessment rolls for the two years 1911-12 and 1912-13 standing as I have said, the pursuers now aver that on 28th July 1914, without any alteration on any of the rolls, they issued demand notes to the defender for the rates for these two years, and the defender not having paid the rates the present action has been brought to enforce payment."

The defender pleaded, *inter alia*—"(1) The action is incompetent. (2) The action is irrelevant."

On 6th February 1915 the Sheriff-Substitute (A. S. D. THOMSON) sustained the first plea-in-law for the defender.

Note.—"I had an interesting and able argument upon the closed record, but having consulted all the authorities cited at the debate I feel unable to resist the authority of or to distinguish this case from the case of the *County Council of Argyll* v. *Walker*, 1909 S.C. 127, 46 S.L.R. 107. . . .