THE

SCOTTISH LAW REPORTER.

WINTER SESSION, 1901–1902.

COURT OF SESSION.

Tuesday, October 15, 1901.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

POLLOCK *v.* CORPORATION OF GLASGOW.

Reparation — Negligence — Contributory Negligence—Boy Jumping off Tram-Car in Motion—Master and Servant—Master's Responsibility for Acts of Servant—Boy Shifting Points at Request of Tramway Servants.

The father of a boy of eleven, as tutor of his son, raised an action of damages against the proprietors of a tramway car undertaking. The pursuer averred that at one of the tramway termini it was the custom for the drivers and conductors to employ boys not otherwise in the service of the defenders to shift the points; that this practice was well known to the defenders, who had never forbidden or prevented it, and indeed took benefit from it, as it enabled their cars to be more rapidly despatched; that on 8th August 1900 the pursuer's son shifted the points at the request of the driver of one of the cars with a piece of iron carried on the platform of the car for that purpose; that after doing so the boy jumped on to the front platform with the iron, which he was told by the driver to put down in its place behind where he stood; that the driver, instead of stopping the car, as he ought to have done, to allow the boy to get off in safety, drove on at full speed; that the boy, finding that the car was not to be stopped for him, proceeded to get off while it was in motion, with the result that he fell, and the car went over his left leg; and that the accident happened through the fault of the defenders or those for whom they were responsible, through the driver and conductor of the car allowing a lad of the age of the pursuer's son to shift the points in accordance with the above custom, and the driver permitting the boy to get off the platform while the car was in motion.

Held that the action was irrelevant.

James Pollock, paper-mill worker, Glasgow, as tutor and administrator-in-law of his pupil son James Pollock junior, and for his own right and interest, raised an action against the Corporation of Glasgow, in which he concluded for payment of £500 as damages for injuries sustained by his said son.

The pursuer averred that his son was eleven years of age, and that the defenders were owners of the tramway car undertaking within the city of Glasgow. He further averred as follows — "(Cond. 2) On or about the 8th August 1900, and at about two o'clock afternoon, the said James Pollock junior was playing with some other boys in Dalmarnock Road at the tramway car terminus near Dalmarnock Bridge. At this time a car, No. 432, driven by Samuel Owens, 9 Queen Street, Partick, and in charge of James Bruce, of 264 Dumbarton Road, Partick, Glasgow, as conductor, was approaching the terminus from town. The car reached the terminus, the horses were changed, and everything was in readiness for the return journey. In order to get on to the line on which the return journey was to be made it

was necessary that the points should be shifted, and it is averred that it has for years been the custom for the driver and conductor of the said car, and of the other drivers and conductors of the company on route No. 9, to employ boys not otherwise in the service of the Corporation to shift the points, and that this practice is well known to defenders, who have never forbidden or taken any steps to prevent it. In point of fact they take benefit from it, as it enables the cars to be more rapidly despatched. (Cond. 3) On the occasion in question the said James Pollock junior, at the request of the said driver, who directed him where on the car to get the piece of iron which is carried on each car, and is used for the purpose of shifting the points, shifted the points with the iron near the terminus in question. While this was being done the car moved towards and passed the points, and as it was necessary, or at all events customary, for the boys to return to and mount the front platform of the car in order to replace the said iron implement, the said James Pollock junior went back and met the car, and jumped upon the front platform with the iron, which he was told by the driver to put down in its place behind where he stood. The driver, instead of stopping the car, as he ought to have done, to allow the boy to get off in safety, drove on at full speed. The boy finding, as was the fact, that the car was not to be stopped for him, proceeded to get off while it was in motion, with the result that in doing so he stumbled and fell, and the car went over his left leg and seriously injured it. (Cond. 5) The accident in question happened through the fault of the defenders, or those for whom they were responsible, through the driver and the conductor of the car conforming to the above-mentioned custom, which has been countenanced for a long time by defenders and their servants, and allowing a lad of the age of the said James Pollock junior to shift the points, and of the said driver permitting the said James Pollock junior to get off from the front platform while the car was in motion.

The pursuer pleaded—"(1) The pursuer's son, the said James Pollock junior, having been injured through the fault of the defenders, or those for whom they are responsible, the pursuer, as his tutor and administrator-in-law, is entitled to compensation as concluded for."

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

On 26th February 1901 the Lord Ordinary (KINCAIRNEY) approved of an issue proposed by the pursuer, and appointed it to be the issue for the trial of the cause.

The defenders reclaimed, and argued—The action was irrelevant. There was no averment on record that the boy made any request to the driver that the car should be stopped. There was no averment that the driver knew that the boy wanted to get off. It must therefore be assumed that the driver was never asked by the boy to stop, and had no other intimation that the boy wanted to get off. In such circumstances the driver was not entitled to think that the boy wanted to get off—his duty was to drive on. Further, the boy was not in the position of a passenger; he was a trespasser or a volunteer. If it were true that he came on the car at the invitation of the driver, the driver in giving that invitation had acted beyond the scope of his employment, and the defenders were not liable for the consequences of his action—*M'Graw* v. *Edinburgh Street Tramways Company*, January 10, 1891, 28 S.L.R. 256, *per* Lord Young at p. 257 and Lord Trayner at p. 258; *Docherty* v. *Glasgow Tramways and Omnibus Company, Limited*, Nov. 20, 1894, 32 S.L.R. 353.

Argued for the pursuer—The interlocutor reclaimed against should be affirmed. There was averred on record a practice known to the defenders and approved of by them. In the cases quoted the driver had exceeded his duty; in this case he had the implied authority of the defenders for his mode of procedure. It was the duty of the driver to see that the boy got off the car in safety after depositing the piece of iron. In place of that the driver, in the interests of the defenders and in order that their business might be quickly despatched, drove on at full speed. The boy seeing that the speed of the car was increasing could not be blamed for getting off. In such circumstances the defenders were responsible for the injury which the boy received. In any event the question turned very much on the facts of the case, and a trial should be allowed.

LORD JUSTICE-CLERK — Whatever may have been the arrangement as to this boy and the work which he did for the driver, we must assume that it was tolerated by the person in charge of the tramway. I think this case turns on what was the direct action of the boy at the time when the accident happened. The boy was on the car, and it was going at a high speed, and he jumped off. It is not suggested that he was told by the driver to jump off. The averment of the pursuer is, that seeing that the car was going on at full speed he proceeded to get off while it was in motion. I think that averment does not state a relevant case entitling the pursuer to an issue; the true fault was in jumping off at such a time, and that was the boy's own act.

LORD TRAYNER — I am of the same opinion. The pursuer avers as his grounds of claim against the defenders, (1) a faulty or improper system on the part of the Tramway Company, known to and not disapproved of by them, and (2) fault on the part of their servant, the driver of the car. I think no relevant ground of action has been averred in respect of the alleged faulty system, for it is clear from the pursuer's averments that that system did not in any way lead to the injury which the pursuer's son sustained. The operations designated the "system" were completely carried out with absolute safety to the boy. With regard to the second ground, viz.,

the fault of the driver, I find no relevant averment of such fault. All that is said is, that after the boy had got upon the car the driver "drove on at full speed." I take it that that was the driver's duty, and the performance of it no fault. If he had driven off as the boy was mounting on the car, or when he knew the boy was leaving the car, there might have been fault. But the driver knowing that the boy was safely on the car was guilty of no fault in driving on. It is not said that he had any reason to think that the boy wanted to descend from the car, or that he knew the boy was preparing to do so. But the pursuer's averment discloses that the accident which happened was the result of the boy's own fault. In the knowledge that the driver had "driven on," and while the car was in motion, he jumped off the car, with the result that he sustained the injuries complained of. For such result the defenders are not liable. The record therefore, in my opinion, discloses no relevant ground of action against the defenders.

LORD MONCREIFF — I am of the same opinion. The two questions of fault on the part of the driver and contributory fault on the part of the boy run into each other. I think there is no relevant averment of fault on the part of the driver, because it is not stated, as I think it should have been, that the boy made any request that the car should be stopped. Accordingly, the accident, as stated, simply occurred because the boy jumped off when the car was in motion.

There might have been a question (but it is not necessary to consider it) whether the boy was a volunteer. A volunteer cannot be in a better position than a servant, and if this boy was a volunteer he was a fellow-servant of the driver, in respect of whose fault he could not recover damages from the driver's employers.

LORD YOUNG was absent.

The Court recalled the interlocutor reclaimed against, and dismissed the action as irrelevant.

Counsel for the Pursuer and Respondent —A. S. D. Thomson. Agent—J. Murray Lawson, S.S.C.

Counsel for the Defenders and Reclaimers —Salvesen, K.C. — Constable. Agents — Simpson & Marwick, W.S.

Tuesday, October 15.

FIRST DIVISION.

GRAHAM *v.* GRAHAM'S TRUSTEES.

Process—Motion to Sist Mandatary—Soldier on Foreign Service.

In an appeal from a Sheriff Court the defender moved that the pursuer and appellant, who was a soldier absent on service in China, should be ordained to sist a mandatary. The action was one of accounting, directed by the pursuer against his father's trustees. From a statement furnished by the trustees' agent to the pursuer, and produced in this action, it appeared that the pursuer would be entitled to a certain amount as legitim. Motion to sist mandatary *refused.*

Peter Macpherson Graham, gunner in the Royal Artillery, brought an action in the Sheriff Court at Glasgow against Alexander Lang and others, trustees acting under the trust-disposition and settlement of his father, the late Alexander Graham, wine and spirit merchant in Glasgow. The conclusions of the action were for an account of the trustees' intromissions, and for payment to the pursuer of the sum of £2000, or such other sum as should be found to be due to him as legitim.

In defence the trustees maintained that the goodwills of the licensed premises in which the deceased had carried on business were heritable and not moveable estate, and that unless these goodwills were treated as moveable there was no free moveable estate available for payment of legitim.

From a statement of the legitim fund on the late Alexander Graham's estates, furnished to the pursuer by the agent of the trustees, and produced in this action, it appeared that the amount due to the pursuer as legitim was £70, 9s. 9d. With reference to this statement the trustees now stated that it was not correct, in respect that it included the value of the goodwills.

On 6th July 1901 the Sheriff-Substitute (BOYD) pronounced an interlocutor whereby he found that the goodwills could not be regarded as moveable; therefore so far sustained the defences and assoilzied the defenders; and *quoad ultra* allowed a proof.

The pursuer appealed to the Court of Session.

On the case being called in the Single Bills, counsel for the defenders stated that the pursuer was absent in China on active service, and moved that he be ordained to sist a mandatary—*Dessau* v. *Daish*, June 26, 1897, 24 R. 976, 34 S.L.R. 739.

The pursuer argued, that in the circumstances of the case, having regard to the facts (1) that the trustees had, according to the statement of their own agents, a sufficient sum in their hands to which the pursuer had right to secure their claim for expenses, and (2) that the pursuer had not left the country voluntarily, but in pursuance of his duty as a soldier, the motion should be refused—*Simla Bank* v. *Home*, May 21, 1870, 8 Macph. 781, 7 S.L.R. 487; *Ritchie* v. *M'Intosh*, June 2, 1881, 8 R. 747, 18 S.L.R. 528.

LORD PRESIDENT—It appears to me that there is no ground for compelling the pursuer to sist a mandatary. It is not disputed that the pursuer is a lawful child of the person whose estate is being administered by the defenders; and it is not alleged that his claim to legitim has been excluded by antenuptial marriage-contract or discharged