Saturday, May 23.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

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

Process—Proof or Jury Trial—Action of Damages for Personal Injury—"Special Cause"—Doubtful Relevancy—Discretion of Lord Ordinary—Evidence Act 1866 (29 *and* 30 *Vict. cap.* 112), *sec.* 4.

In an action of damages against a tramway company for personal injury sustained by a child through being knocked down by a cable car, the pursuer averred fault in the construction of the car, which prevented the driver from seeing the child crossing the rails, and, alternatively, fault on the part of the driver in failing to keep a proper lookout. The defenders averred contributory negligence on the part of the child or its parents. The Lord Ordinary refused issues and ordered proof, on the ground that the pursuer's averments were of doubtful relevancy.

The Court, on a reclaiming note—*holding* that doubtful relevancy was a "special cause" for proof in lieu of jury trial—declined to interfere with the exercise of his discretion.

On Saturday, 16th November 1907, William Henry Duncan Cass, then aged four years and eight months, son of Henry Cass, insurance manager, residing at 2 Eildon Street, Edinburgh, was knocked down and run over by a cable car belonging to the Edinburgh and District Tramways Company, Limited, and driven by one of their servants.

On 23rd December 1907 Henry Cass, as tutor and administrator-in-law of the injured child, raised an action against the Edinburgh and District Tramways Company, Limited, concluding for £2500 damages.

The pursuer averred, *inter alia*—"(Cond. 2) About four o'clock on the afternoon of Saturday, 16th November 1907, the pursuer's said son, who was four years and eight months old at the time of the accident described below, left his father's house to buy nuts at the shop of William Lumsden, grocer, 1 Inverleith Terrace, which is in the immediate vicinity. Eildon Street, where the pursuer resides, is on the east side, while Inverleith Terrace is on the west side of Inverleith Row and about 150 yards south of Eildon Street. One of the defenders' lines of tramway runs along Inverleith Row to and from the terminus at Goldenacre. The pursuer's said son duly made his purchase and proceeded to return home along the west or Inverleith Terrace side of Inverleith Row. When he had reached a point about 20 to 25 yards northwards of Inverleith Terrace he left the pavement and was in the act of walking across Inverleith Row to reach his father's house in Eildon Street, when without any warning he was suddenly knocked down and run over by one of the defenders' cable cars, No. 127, which came up from the south and was running towards Goldenacre. The front wheel or wheels on the near side of the car went over his legs, with the result that both legs were so badly broken and crushed that they had to be amputated, one at the knee joint and the other slightly below the knee. One of his thighs was also fractured. The boy survived the accident and the operation of amputation, and he is still alive. (Cond. 3) The said accident was caused through the fault of the defenders or of their servant the driver of said car for whom they are responsible. The said car, No. 127, forms one of a series of eight running on the same route. They are the most antiquated type of car in Edinburgh, and originally were Nos. 1 to 8 of the old Northern Tramway Company's running stock. Since the defenders took over the said company and its stock these cars have been re-numbered Nos. 121 to 128 inclusive. Said cars are provided with a stair at each end by which passengers ascend to the top of the car. Said stair is built on a dangerous and obsolete system. It starts from the left front of the platform and in gradually rising to the level of the top of the car it passes obliquely in front of the driver of the car in such a manner as to completely obscure his vision to the front and left front of the direction in which the car is travelling. Further, the said car, like all the other cars used by defenders, was provided with a guard in front, which is intended to prevent any obstruction which may be encountered by the car on the street from passing under the car or its wheels. The guard on the car was quite out of date and ineffective for that purpose, for it allowed the boy's legs to pass freely underneath it, and so allowed the wheels to pass over them. Or otherwise, if it was at all possible for the driver to see what was in front or to his left front he negligently and culpably failed to keep a proper lookout when the car was travelling. Had the car been constructed (as it ought to have been) so as to allow the driver a clear and unobstructed view of the road to his front and left front, and had he kept a proper lookout so as to avoid foot-passengers and traffic, the accident to the pursuer's son would not have happened. The driver would have been able to see the boy and ring his bell in ample time to warn him of the approach of the car, and he would also have been able to pull up his car in ample time to avoid the accident. It is possible to stop any of the defenders' cars within a few yards. As it was the driver did not, and could not, see the boy or know that he was there till the car was upon him. At the time of the accident it was broad daylight. No bell was rung or other warning given to the pursuer's son of the approach of the car, and he did not and could not hear it approaching because of a strong head wind which was at the time blowing against it. Further, the day in question was damp and 'murky,' with the result that the rails were greasy and the running

of the car made less noise than it would have otherwise done. The said accident was thus due either to the faulty and dangerous construction of said car in that it prevented the driver from having a proper view of the road in front and on the left front in the direction in which the car was travelling, or to the culpable failure of the driver to keep a good lookout and warn foot-passengers crossing the street of the approach of his car."

The defenders denied that the accident was due to fault on their part, and explained that the car was constructed by first-class makers, and was duly licensed by the city authorities, and that similar cars were in use in other large cities.

They further averred—"(Ans. 3)—The defenders' driver was, on the occasion in question, driving carefully and was keeping a good lookout. Just before the accident he passed a car coming from the opposite direction and sounded his bell. The pursuer's son, however, suddenly rushed from the pavement right in front of the car, and so rendered the accident inevitable. It was impossible on account of the sudden appearance of the pursuer's son to stop the car in time to avoid the accident. The said accident was due to, or was materially contributed to, by either (*a*) the fault of the pursuer's son in suddenly placing himself right in front of the car; or (*b*) to the fault of his parents in allowing a child of such tender age to wander unattended in a public street of the city. The driver did all that in the circumstances a capable driver could do to avoid accident."

The pursuer pleaded—"(1) The said accident to the pursuer's son having been caused through the fault of the defenders or of those for whom they are responsible, they are liable in damages and *solatium* therefor."

The defender pleaded—"(1) The pursuer's averments being irrelevant and insufficient to support his pleas, the action should be dismissed. (2) The pursuer's son not having been injured through the fault of the defenders they should be assoilzied. (3) The pursuer's son's injuries have been caused or materially contributed to by either (*a*) his own fault, or (*b*) the fault of his parents, decree of absolvitor should be pronounced."

On the adjustment of issues, the defenders moved that the cause should be remitted to proof instead of to jury trial.

On 6th March the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel on the proposed issue for the pursuer and considered the question as to the mode of proof to be allowed in this cause, finds that the cause is more suitable to be disposed of by way of proof before his Lordship than by jury trial: Therefore disallows the issue, repels the defenders' first plea-in-law; allows to the parties a proof of their averments on record."

Opinion.—"The pursuer's case is alternative. Either the car which knocked down and ran over his pupil son was so badly constructed that the driver could not have seen the child so as to avoid knocking him down and running him over, or, if these averments are unfounded, then the accident was due to the driver's failure to keep a proper lookout. I do not think the pursuer is entitled so to state his case. The faulty condition of the car was of a permanent nature; and the identical car, according to him, is still running unaltered, as well as seven others of the same construction. His experts must know whether it is the fact, as alleged by him, that the stair of the car is so constructed 'as to completely obscure his (the driver's) vision to the front and left front of the direction in which the car is travelling,' and that 'the driver did not and could not see the boy or know that he was there till the car was upon him.' If permission to examine and test the car was refused, the pursuer could have got an order. The right to state alternative cases must be subject to some limitation. Obviously a pursuer would not be entitled to say, in the case of an existing and unaltered carriage, that it had no brake, or, if it had a brake, it was not applied. For the same reason, namely, that the alternatives are mutually inconsistent, I hold the pursuer to his primary averment of bad construction of the car completely obscuring the driver's vision to his front and left front so that he did not and could not see the boy or know that he was there till the car was upon him. If that averment is well founded the accident could not have any connection with want of proper lookout on the driver's part, and the case made on record against the defenders, as being responsible for the driver's want of lookout, is irrelevant on the pursuer's averments.

"In the absence of any specialty, the result would be to send the case to jury trial on the question of the faulty construction of the car. But the defenders maintain that on the pursuer's averments, properly construed, it is clear that the proximate cause of the accident was, *first*, the action of the parents in allowing so young a child to go about unattended, and *second*, the action of the child in stepping in front of a moving car. They found on the averment in condescendence 2 to the effect that the child, going unattended, after walking some distance along the pavement on the west side of Inverleith Row left the pavement and was 'in the act of walking across Inverleith Row' when he was knocked down by a car travelling northwards, but not at excessive speed, on the westmost pair of rails. As stated in Cond. 2, the averments, so far as any explanation is given of the conduct of the child, resemble the facts as they came out in the case of *Fraser* v. *Edinburgh Tramways Company*, 10 F. 264. But the pursuer explains that the child did not walk straight across, but was going in a slanting direction, the result being that the car was coming up behind him, so that he could not see the car, nor could he hear it through the strong north wind and the noiseless running of the car produced by the greasiness of the rails. The pursuer, who declined to amend, thus seems to me

to table a case of such doubtful relevancy that, although with his counsel's explanation I am not prepared to throw it out, I think it ought to be sent to proof and not to jury trial. The reason for sending the case to proof is strengthened by these circumstances—*first*, the delicate nature of all questions of contributory negligence in the case of children; *second*, the effect of the Board of Trade Regulations relied on by the pursuer, if they go beyond a mere statement of the defenders' common law liability; and *third*, because the question of the proper construction of cars, depending as it does on expert evidence, is better fitted for trial before a judge than for jury trial."

The pursuer reclaimed, and argued—This was an action of damages, and as such specially appropriated to jury trial by the Judicature Act (6 Geo. IV, cap. 120), section 28. The Evidence Act 1866 (29 and 30 Vict. cap. 112), section 28, allowed such cases to be sent to proof instead of to jury trial only on special cause shown,—*Sharples* v. *Yuill & Company*, May 23, 1905, 7 F. 657, 42 S.L.R. 538. There was no special cause here, and the alternative case presented by the pursuer did not make the relevancy doubtful. Though questions of law might arise, that fact did not amount to special cause entitling the judge to send the case to proof instead of to jury trial—*M'Avoy* v. *Young's Paraffin Oil Company, Limited*, November 5, 1881, 9 R. 100, 19 S.L.R. 61; *M'Intosh* v. *Commissioners of Lochgelly*, November 3, 1897, 25 R. 32, 35 S.L.R. 50; *Rhind* v. *Kemp & Company*, December 13, 1893, 21 R. 275, 31 S.L.R. 223; *Edinburgh Railway Access and Property Company* v. *John Ritchie & Company*, January 7, 1903, 5 F. 299, 40 S.L.R. 244. The question of contributory negligence was one of fact—*Campbell* v. *Ord & Maddison*, November 5, 1873, 1 R. 149, 11 S.L.R. 54—and cases raising that question had been sent to jury trial—*Fraser* v. *Edinburgh Street Tramways Company*, December 2, 1882, 10 R. 264, 20 S.L.R. 192. In *Jack* v. *Rivet, Bolt, and Nut Company, Limited*, March 10, 1904, 6 F. 572, 41 S.L.R. 429, the sole question in the case was one of law, while in *Cooke* v. *Leith Harbour and Dock Commissioners*, November 24, 1905 (O.H.), 13 S.L.T. 536, the probability of small damages was taken into consideration.

Argued for defenders—The Lord Ordinary in deciding on the appropriate mode of inquiry, was exercising a discretion with which the Court would not readily interfere—*Weir* v. *Grace*, March 10, 1898, 25 R. 739, 35 S.L.R. 566; *Fearn* v. *Cowpar*, March 14, 1899, 1 F. 751, 36 S.L.R. 593; *Edinburgh Railway Access and Property Company* v. *John Ritchie & Company*, *cit.*; *Vallery* v. *M'Alpine & Sons*, May 16, 1905, 7 F. 640, 42 S.L.R. 535. The accident happened in broad daylight, and there was no averment of excessive speed of the car. In these circumstances the question of contributory negligence must arise, for either the child was guilty of contributory negligence in attempting to cross the street when he did—*Fraser* v. *Edinburgh and District Tramways Company*, *cit.*—or the parents were negligent in allowing so young a child to be on the street alone—*Gibson* v. *Police Commissioners of Glasgow*, March 3, 1893, 20 R. 466, 30 S.L.R. 469; *Grant* v. *Caledonian Railway Company*, December 10, 1870, 9 Macph. 258, 8 S.L.R. 192. The case was therefore one of doubtful relevancy, and would probably involve at the inquiry a determination of difficult questions of law, either of which facts justified sending the case to proof instead of to jury trial—*Jack* v. *Rivet, Bolt, and Nut Company*, *cit.*; *Vallery* v. *M'Alpine & Sons*, *cit.*; *Cooke* v. *Leith Harbour and Dock Commissioners*, *cit.*; *Govan* v. *J. & W. M'Killop*, December 20, 1907, 15 S.L.T. 658. The case of *M'Intosh* v. *Commissioners of Lochgelly*, *cit.*, had not been followed. Though there had been cases where the Court had recalled the Lord Ordinary's interlocutor allowing a jury trial and ordered proof instead, there was no case where the Court had sent an issue to jury trial if the Lord Ordinary had allowed a proof. [But see *Bell* v. *Adams & Company*, June 15, 1907, 44 S.L.R. 775.]

Lord Stormonth Darling—I concede that this case, as being properly and in substance an action of damages, is *prima facie* one for jury trial, and that special cause requires to be shown before any other course can be followed. But the Lord Ordinary has applied his mind to the question of how the case should be tried, and he has decided that the mode of inquiry should be by a proof before himself, the date of which he has fixed. Now I think we should do wrong to interfere with that which I think is in reality the exercise of a discretion. It may be said with some force that it is not the exercise of a discretion, and that the Lord Ordinary is practically bound to allow a jury trial unless he can show something which is clearly a special cause; but in the case of *Vallery* v. *M'Alpine* (7 F. 641) it was held by Lord Pearson, and approved by this Division of the Court, that doubtful relevancy is a sufficient "special cause"; and, accordingly, when the case came here, I find that the Lord Justice-Clerk in delivering the only judgment which is reported says—"In the present instance the Lord Ordinary has exercised his discretion by sending the case to proof, and I should be very slow to interfere with what he has decided in the exercise of his discretion. I do not say that there might not be cases in which the Court would interfere, but it would require to be on very strong grounds."

A similar course was followed in the other division in the case of *Jack* v. *Rivet, Bolt, and Nut Company, Limited*, in 6 F. 572, and therefore I think we should not interfere with the discretion which the Lord Ordinary has exercised after a very full and careful consideration of the whole matter. This is a case, I think, of doubtful relevancy, both because there are two alternative grounds of liability averred, and because there is a question as to the application of the law of contributory negligence in the case of a child. That is always a matter of some

delicacy; and on the whole matter I am of opinion that the interests of justice will be better served by following the course of the Lord Ordinary's judgment than by sending the case to a jury.

LORD LOW—I have felt this case to be attended with great difficulty. I confess that if I had been sitting here as a judge of first instance I should have been disposed, after the argument which we have heard, to allow an issue. But, very properly I think, the Inner House has always been slow to disturb the conclusion arrived at by the Lord Ordinary on a question of this sort, which, after all, is really a question of procedure, and I quite recognise that there is a great deal to be said for the view that a right result is more likely to be reached in this case if it be tried by way of proof and not by a jury.

Accordingly I agree that we should not disturb the judgment of the Lord Ordinary.

LORD ARDWALL—I concur with your Lordship in the chair.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Orr, K.C.—Kemp. Agent—Francis S. Cownie, S.S.C.

Counsel for the Defenders (Respondents)—Watt, K.C.—Horne. Agents—Macpherson & Mackay, W.S.

Friday, February 7.

OUTER HOUSE.

[Lord Johnstone.

ROBERTSON (LIQUIDATOR OF R. & W. FALCONER, LIMITED) *v.* DRUMMOND AND OTHERS.

Bankruptcy—Company—Liquidation—Preferential Claims—Insufficiency of Assets—Order of Priority in Ranking Preferential Claims—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 110.

In the liquidation, under supervision, of a company whose estate realised in gross a sum insufficient to meet all the preferable claims, there was first deducted the expense of bringing the estate into possession of the liquidator; and upon the balance there was ranked (1) the expenses allowed in the interlocutor placing the voluntary liquidation under supervision and appointing a liquidator in place of the voluntary liquidator; (2) the cost of material and the cash supplied to the voluntary liquidator; (3) the liquidator's agents' accounts for necessary business in the liquidation; and (4) the rates, taxes, and servants' wages; which four sets of claims together exhausted the fund leaving no remuneration to the liquidator.

The Companies Act 1862 (25 and 26 Vict. cap. 89), section 110, enacts—"The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding-up any company in such order of priority as the Court thinks just."

On 3rd November 1906 R. & W. Falconer, Limited, tinplate manufacturers, Edinburgh, went into voluntary liquidation, and Alan Drummond, accountant, was appointed voluntary liquidator. Subsequently a petition was presented to the Court for the compulsory winding-up of the company at the instance of Messrs Fallows & Company of Liverpool, who were creditors. By interlocutor of the First Division dated 13th November 1906 the Court continued the voluntary liquidation under supervision, superseded the voluntary liquidator, and appointed George Allan Robertson, C.A., as liquidator in his place.

The Company's estate realised £549, 0s. 1d., and as this was insufficient to meet the preferential claims the liquidator on 5th February 1908 presented the following scheme of ranking:—

"1. Liquidator's out-of-pocket expenses, in connection with the final realisation of the estate and the winding-up of the company, estimated at the sum of £ 10 0 0

2. Legal expenses falling to be incurred by the liquidator in connection with the final realisation of the estate and the winding-up of the company, estimated at the sum of - - 60 0 0

3. Legal expenses incurred by the liquidator up to 20th September 1907 in connection with the realisation of the liquidation estate - - - - - - 299 15 6

4. Liquidator's remuneration for trouble and responsibility in connection with the realisation of the liquidation estate, as the same may be fixed by the Court —

5. Legal expenses in connection with the petition for winding up the company, in terms of the interlocutor by the Lords of the First Division, dated 13th November 1906—

1. Messrs Scott & Glover, W.S., as agents for Messrs Wm. Fallows & Co., of Liverpool, petitioners - - - £88 3 4
2. Messrs Robertson & Wallace, S.S.C., agents for Mr Alan Drummond, voluntary liquidator of the company - - - 40 5 2
3. Messrs Weir & Robertson, S.S.C., as agents for R. & W. Falconer, Ltd. - - - - - - 22 0 0

——— 150 8 6