LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuer—Jameson—Hay. Agent—R. D. Ker, W.S.

Counsel for the Defender — Murray — Campbell. Agents—J. & J. Galletly, S.S.C.

Wednesday, November 6.

FIRST DIVISION.

[Lord Trayner, Ordinary.

SCOTT AND OTHERS (SCOTT'S TRUSTEES) *v.* MOSS.

Reparation—Damages—Issue—Relevancy.

A promoter of public entertainments engaged an aeronaut to make a balloon ascent from certain recreation grounds. It was agreed that the aeronaut on attaining a certain height should descend from the balloon by means of a parachute. The entertainment was largely advertised, and in addition to those who obtained access to the enclosure on payment a large crowd assembled on the adjoining roads and land. The aeronaut descended from the balloon, and alighted in a turnip field, into which large numbers of the outside crowd rushed, causing damage for which the owners of the property sued the promoter of the entertainment.

The pursuers averred—"The defender knew that Baldwin would come down near the said grounds, and he knew also that a great part of the land all round said grounds was occupied by crops, and that a large crowd would be attracted by the proceedings, and that the parachute would descend in ground where damage would be done by it, and also that a crowd of people would immediately, on the parachute descending, rush to it and do great damage to fences, gates, and crops in and near the place where the parachute came down." They averred further—"The action of the crowd and the damages caused as aforesaid were the natural result of the defender's actings as before condescended on, and must or ought to have been foreseen by him."

Held that the action was relevant, and the following issue was adjusted for the trial of the cause—[*After certain admissions*]—"Whether the said 'Professor Baldwin' on said date ascended in a balloon from the said ground, and descended from the same into an adjoining field, and whether this descent therein might readily have been foreseen by the defender; whether the said field was occupied by the pursuers as part of the farm of Lochend, and whether, induced by the said advertisements of the defender, a crowd of persons collected on the roads and other places in the vicinity of the said farm, and whether in consequence of the said descent being made in the said field occupied by the pursuers, and as the natural and probable effect thereof, they entered the said field and destroyed the fences and gates thereof, and the grass and turnips growing thereon, or some part thereof, to the loss, injury, and damage of the pursuers?"

This was an action of damages by the trustees of the deceased David Scott, farmer, Duddingston, Edinburgh, against H. E. Moss, a promoter of public entertainments in Edinburgh.

The defender had engaged an aeronaut named Baldwin to make a balloon ascent from the Hawkhill Recreation Grounds, which included about 17 acres, and adjoined the pursuers' farm. It was agreed that upon reaching a certain height Baldwin should descend from the balloon by means of a parachute.

A large crowd assembled to witness the exhibition, and in addition to those within the grounds great numbers of people assembled on the roads and elsewhere in the vicinity. The ascent was accomplished as arranged, but Baldwin in descending from the balloon alighted in a field of turnips belonging to the pursuers in close proximity to the Recreation Grounds. A number of those assembled on the roads and in the vicinity of the Recreation Grounds rushed into the turnip field, and caused damage to the fences, gates, grass, and turnips, in respect of which this action was raised.

The pursuers averred—"The said exhibition was extensively advertised by the defender in the newspapers and otherwise, and the said grounds, the charge for admission to which was 1s., were densely filled on the occasion. The performance, as the defender all along well knew it would, also attracted crowds of people to the vicinity of said grounds, many of whom congregated on the public roads and elsewhere. Baldwin made his ascent in a balloon, and as the defender all along knew and intended to be done, he made his descent in the neighbourhood of said grounds by means of a parachute, which it was stated enabled him to come down again to the ground without injury to himself. On the occasion in question Baldwin alighted in the portion of the pursuers' said field in which turnips were growing, and a great crowd rushed into the said field after him. The defender knew that Baldwin would come down near the said grounds, and he knew also that a great part of the land all round said grounds was occupied by crops, and that a large crowd would be attracted by the proceedings, and that the parachute would descend in ground where damage would be done by it, and also that a crowd of people would immediately, on the parachute descending, rush to it and do great damage to the fences, gates, and crops in and near the place where the parachute came down."

The defender pleaded, *inter alia*—"(1) No relevant case. (3) The defender having no responsibility for or contract of any kind with the persons who formed the

crowd, and who are alleged to have caused the damage sued for, he is entitled to decree of absolvitor."

On 18th January 1889 the Lord Ordinary (TRAYNER) sustained the defender's first plea-in-law and dismissed the action.

"*Opinion.*—I think the pursuers have averred no relevant case from which the liability of the defender can be inferred for the damages sued for.

"The persons who did the damage complained of were not invited to the locality by the defender, and he had no control over their actions when there. Neither the defender nor Baldwin requested or wished the presence of the persons who did the damage in the field where the damage was done. The pursuers maintain that their averments in Cond. 3 made the action relevant, and that the truth of these averments must be assumed. It appears to me that a great part of that article is irrelevant; and, as regards the rest of it, I cannot assume as true what is obviously not so. For example, I think it is not relevant, as inferring liability against the defender, to say that he knew 'Baldwin would come down near the said grounds,' that he knew 'a great part of the land all round said grounds was occupied by crops,' and 'that a large crowd would be attracted by the proceedings.' Assuming such knowledge, it did not follow that the defender knew or had any reason to anticipate that the pursuer's crops would suffer in any way from Baldwin's descent among them or in their vicinity. The remainder of the article cannot be assumed to be true, because it avers knowledge, on the part of the defender, which neither he nor anybody else could have had. How could the defender know that 'the parachute would descend in ground where damage would be done by it?' The descent of the parachute depended on the direction and strength of the wind not merely where and when the balloon left the earth, but the strength and direction of any upper current which had been struck before the aeronaut left the balloon to descend by the parachute. And the parachute was as likely, for anything the defender could know, to descend on one of the adjacent public roads as on the pursuers' turnip field. How, again, could the defender know that immediately on the parachute descending a crowd of people would 'rush to it, and do great damage to fences, gates, and crops in and near the place where the parachute came down?' The defender had had no previous experience of what would take place on the descent of a parachute. How could he know or even anticipate that an outside crowd would behave in an unruly or illegal manner?

"The case of *Walker*, L.R., 5 Eq. 25, and the class of cases to which it belongs, do not appear to me to have any bearing on the question now before me. I concur in the judgment pronounced in *Walker's* case which interdicted the continuance of a proved and experienced nuisance. If an interdict should now be sought against another such entertainment as that referred to in the record, probably an interdict would be granted, because experience has shown that such an entertainment is attended in a high degree of probability with damage to adjoining property. But had the pursuers applied for interdict against the defender or Baldwin before the ascent and descent in question, I would have refused such an application without hesitation. The question now raised is, however, not of interdict, but of damages. In *Walker's* case there is no suggestion that the defendant was liable for anything done by the unruly persons who congregated outside of his entertainment grounds.

"The most direct authority which the pursuers cited in support of their argument was the case of *Guille* v. *Swan*, 19 Johnson 381, decided by the Supreme Courts of the State of New York. In that case Guille descended in a balloon upon the property of Swan, hanging out of the balloon-car 'in a very perilous situation, and he called to a person at work in Swan's field to help him in a voice audible to the pursuing crowd.' The crowd broke down Swan's fence, and destroyed or damaged his flowers and vegetables. The Court held Guille liable not only for the damage which he had done himself but also for the damage done by the crowd, on the ground (1) that if the crowd had heard Guille's call for aid and responded to it, he (Guille) had invited the crowd to come upon Swan's ground, and was liable for what they did there; or otherwise, (2) if the damage complained of was the result of the united action of Guille and the crowd, they being all alike trespassers, Guille as one of them was responsible for the whole damage, as one wrongdoer may be called on to answer for the whole wrong done by him and others in concert. If this case decided nothing more than this, then it does not aid the pursuers. For they have not raised their action against any one of the actual trespassers or wrongdoers. But there is a sentence in the judgment which appears to support to its full extent the pursuers' contention in the present case. It is as follows:—'If his descent under such circumstances would ordinarily and naturally draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation, all this he ought to have foreseen, and must be responsible for.'

"Upon that I remark (1) that the view there expressed was not necessary for the decision of the case, and was not given as a ground of judgment; (2) that it is difficult to dissociate that view as expressed from the actual facts of the case there under consideration, so as to give it either the character or force of an abstract proposition in law; and (3) that if it is intended thereby to lay down as an abstract rule of law that anyone who performs in public an act or experiment which will probably attract a great crowd of observers, is to be responsible for the illegal acts of the crowd so drawn together, as for something which he should have foreseen and provided

against, I dissent (with all deference) from such a proposition."

The pursuers reclaimed.

In the Inner House the pursuers amended the record by adding this averment—"The action of the crowd and the damages caused as aforesaid were the natural result of the defender's actings as before condescended on, and must or ought to have been foreseen by him." They also inserted the terms of the defender's advertisement.

The pursuers argued—The action of the crowd, ought to have been foreseen by the defender and the damage which was done was what might have been expected, and was the natural result of his actings in issuing sensational advertisements and bringing large crowds to the neighbourhood. In this damage the defender was liable—Cases cited by the Lord Ordinary, and *Rex* v. *Moore*, 3 Barn. & Adol. 184; *Rex* v. *Crosse*, 3 Campbell, 224; *Scholes* v. *The North London Railway Company*, 21 Law Times, 835; Addison on Torts (6th ed.) p. 128; Wharton on Negligence, sec. 95; Bevan on Torts, p. 65; Sedwick on Damages, vol. i. 129; *Walker* v. *Brewster*, L.R., 5 Eq. 25; *Inchbold* v. *Robinson*, L.R., 4 Ch. App. 388. This was not a case which should be dismissed on relevancy, and the pursuer was entitled on his averments to an issue.

Argued for the defender—The defender was in no way responsible for the action of the crowd outside the grounds; they were not there by his consent, or at his desire; he derived no benefit from them, nor could he in any way control their actings. It was not to be presumed that the crowd would act in such a disorderly way, and their behaviour was not a continuing act. The purpose for which they had assembled was a lawful purpose, and if while so assembled they acted unlawfully, the party who was the innocent cause of their assembling could not be held responsible—*Fairbanks* v. *Kerr*, 1871, 10 American Reports, 664; *Jenkins* v. *Jackson*, L.R., 40 Chan. Div. p. 7.

At advising—

LORD PRESIDENT—This is a singular case and one that requires a good deal of consideration. I am not inclined to agree with the Lord Ordinary, and throw it out as irrelevant. On the contrary, it rather appears to me that the Lord Ordinary by his judgment has anticipated the functions of the jury. The Lord Ordinary thinks things are unlikely, and incredible, and so forth. That is for the jury, and not for the Court, and the jury will have a very delicate task to perform. Still it ought to be submitted to a jury, and not to be decided by the Court upon relevancy.

The case comes to this. The defender Mr Moss, who is a gentleman occupied very much in providing entertainments for the public, had the occupation of Hawkhill Recreation Grounds. He employed a gentleman, whom he calls Professor Baldwin, to make an ascent in a balloon there, and also to make a descent from the balloon, the latter, the more important part of the entertainment, being that which the people were invited by advertisement to go and see at Hawkhill. He assembled a number of people in the ground at Hawkhill, and charged them for admission to the ground; and that makes it all the more clear that the descent was to be at or in the immediate vicinity of Hawkhill Recreation Grounds, because otherwise the people who had paid for witnessing that wonderful descent would not have seen it at all if it had been made at a distance or at a place altogether uncertain. In addition to the people who were so assembled to see the show within the Hawkhill Recreation Grounds, his advertisement most naturally attracted the attention of the public generally, and as the balloon could be seen ascending and also the aeronaut descending out of the balloon without the public being within the particular enclosure, of course crowds of people came to the neighbourhood. That was quite to be expected; nothing else could be expected but that, and they stood in the roads and other places adjoining the Recreation Grounds, and there they witnessed the descent. Now the descent took place in a field upon the adjoining farm of Lochend, which was in the occupation of the pursuers, and there was no doubt that the natural consequence of the descent taking place there was that all the crowds of people in the neighbourhood immediately rushed towards that field in order to see what was going to happen.

The complaint of the pursuers was that these people entered the field and broke down the gates and fences and destroyed the crop; and the case made against Mr Moss is that he ought to have foreseen that the descent would be made in some field adjoining the Hawkhill Recreation Ground, and that the only and almost inevitable consequence of that would be that the crowds assembled upon the roads in the neighbourhood would break into the field and destroy the crop. No doubt it would not easily be foreseen that the descent was to be made in that particular field, but then Hawkhill Recreation Ground is surrounded by cultivated land, and it could be very easily foreseen that the descent would be in some piece of cultivated ground in the immediate vicinity. That is the way in which the pursuers put the case, and the Lord Ordinary's view seems to be that he does not think they will be able to make it out. That is not a reason for holding it irrelevant. It is for the jury to say whether they make it out or not. Accordingly, I think the case should be sent to a jury, but upon a very precise and full issue. I shall read for the benefit of the parties what the Court thinks is the form of issue that ought to be adopted. It is this—"Whether the defender, having rented a piece of ground called Hawkhill Recreation Ground, employed a person whom he described as Professor Baldwin to ascend in a balloon from the ground, and then to make a descent from the balloon at or in the vicinity of the ground, and advertised in

the newspapers and otherwise, under the heading 'Drop from Cloudland,' that 'Professor Baldwin, the world-renowned scientific aeronaut, will make his remarkable descent at Hawkhill Recreation Grounds, Edinburgh, on 1st October 1888,' whether Professor Baldwin on that date ascended in the balloon from the ground, and descended from it into the adjoining field, as might readily have been foreseen by the defender, whether that field was occupied by the pursuers as part of the farm of Lochend, whether, induced by the advertisements of the defender, a crowd of persons collected on the roads and other places in the vicinity of the farm, and, in consequence of the descent being made in that field, and as a natural and probable effect of it, entered the field and destroyed the fences and gates thereof, and the grass and turnips thereon, or some part thereof, to the loss, injury, and damage of the pursuers?"

LORD SHAND—This case is, as your Lordship has remarked, a most peculiar one, and has led us to the consideration of one or two other curious cases before we have arrived at the decision mentioned by your Lordship.

I am quite of the opinion which has been expressed, that this case ought not to be turned out of Court on the record on a question of relevancy. If the pursuer succeeds in convincing the jury that the injury which he has sustained was occasioned through the fault of the defender, or was the natural result of the advertisements issued by the defender, then undoubtedly he will be in a position to claim damages. No doubt the record which we now have is not the same as that which was before the Lord Ordinary. It has been materially amended, and a statement has been added that the action of the crowd was the probable and natural result of what the defender had done. There has also been introduced into the record the defender's advertisement, which was so framed as necessarily to draw a large general crowd in addition to the persons who by payment of the entry money obtained access to the enclosed grounds.

The defender objects that as the record only discloses that it was the outside crowd who did the damage complained of, who were there against his will, and were in no way under his control, that he cannot be made responsible for their actings.

In the ordinary case a crowd which assembles for any purpose does not render the person on whose account it has come together responsible for its actings, and very special cause indeed would require to be shown to involve him in liability. But in the present case the damage which a crowd like that which assembled on the roads and in the immediate vicinity of these grounds would do might without much difficulty have been foreseen. If what I have indicated is now relevantly set out on record, as I am of opinion it is, then the pursuer is entitled to an issue.

No doubt the defender urges that he did not desire the presence of this unruly crowd; that may be so, but the presence of such a crowd was the natural result of his advertisements, and it was a result which the defender was bound to anticipate. If it can be shown on the evidence that the defender was the proximate cause of the damage which resulted, first, by his bringing together a crowd by his advertisements, and second, by his arranging that his entertainment should take place in the immediate vicinity of cultivated land, then the pursuer will undoubtedly succeed; while if he fails to establish these facts to the satisfaction of the jury, then the verdict will be for the defender.

I only desire to add, with reference to that portion of the Lord Ordinary's note in which he says that if an interdict were now sought against another such entertainment it would probably be granted, because experience has shown that it is attended with the risk of damage to neighbouring property, that the question whether or not a party is to be entitled to interdict is not one which is to be settled by experience but by principle, and that such a remedy would be afforded if it could be shown that damage to property was the natural or reasonable result of what was proposed to be done.

LORD ADAM—I concur. I think that the ground of the defender's liability in law is that a person is not entitled to do anything on his own property which is likely to cause damage to his neighbour. The Lord Ordinary has taken a different view of the law. He says he would grant interdict if another such entertainment was proposed, but he would not have granted it if it had been applied for prior to this entertainment.

As Lord Shand has pointed out, the only ground upon which interdict could in such a case have been refused was, that it could not have been anticipated that what the defender or Baldwin proposed to do would be attended with any damage to the neighbouring property.

If, however, what has taken place was manifestly the natural result of sanctioning such a performance, then clearly no previous experience was necessary to warrant anyone apprehending damage from applying for and obtaining an interdict.

The case, as your Lordship has said, must go to a jury, who, if they are satisfied that the damage which has occurred was the natural result of the defender's actings, will find him liable.

The Court recalled the Lord Ordinary's interlocutor, and adjusted the following issue for the trial of the cause:—

> "It being admitted that the defender in or about September 1888 rented a piece of ground called 'Hawkhill Recreation Grounds,' in order that a person known as Professor Baldwin should on or about 1st October 1888 ascend in a balloon from the said ground, and thereafter make a descent from the said balloon, and advertised in the newspapers and otherwise, under the

heading of 'Drop from Cloudland,' that 'Professor Baldwin, the world-renowned scientific aeronaut, will make his remarkable descent at the Hawkhill Recreation Grounds, Edinburgh;' whether the said 'Professor Baldwin' on said date ascended in a balloon from the said ground and descended from the same into an adjoining field, and whether this descent therein might readily have been foreseen by the defender; whether the said field was occupied by the pursuers as part of the farm of Lochend, and whether, induced by the said advertisements of the defender, a crowd of persons collected on the roads and other places in the vicinity of the said farm, and whether in consequence of the said descent being made in the said field occupied by the pursuers, and as the natural and probable effect thereof, they entered the said field and destroyed the fences and gates thereof, and the grass and turnips growing thereon, or some part thereof, to the loss, injury, and damage of the pursuers?"

Counsel for the Pursuers—Gloag—Dickson. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender — Rhind—Baxter. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Tuesday, November 5.

FIRST DIVISION.

[Sheriff of Lanarkshire.

NORTH BRITISH RAILWAY COMPANY *v.* M'ARTHUR.

Process—Sheriff—Appeal—Competency of Appeal—Value of Cause—Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 22.

A summons of sequestration for rent under the Debts Recovery (Scotland) Act 1867 concluded for warrant to sequestrate the goods on the premises let for payment of the rent due, which was £22, 10s., and for warrant to sell the goods sequestrated. An objection to the competency of an appeal against the judgment of the Sheriff, on the ground that the value of the cause was under £25, *sustained.*

Thomson v. *Barclay*, February 27, 1883, *distinguished.*

In 1888 the North British Railway Company let to Mr L. J. M'Arthur certain premises at 88 North John Street, Glasgow, under a lease for a tract of years, with entry at Martinmas 1888, at a yearly rent of £45, payable half-yearly at Whitsunday and Martinmas in equal portions. Mr M'Arthur having failed to pay the rent due at Whitsunday 1889, £22, 10s., the railway company took out a summons of sequestration against him under the Debts Recovery Act of 1867 in the Sheriff Court of Lanarkshire. The conclusions of the summons were in these terms—"That warrant ought forthwith to be granted to inventory, appraise, sequestrate, and, if need be, secure the goods and effects upon or within the said premises; and decree ought to be pronounced decerning the defender to make payment of the said rent to the pursuers, with expenses; and warrant ought also to be granted to sell the goods and effects sequestrated in payment of the said rent and expenses."

The defender pleaded, *inter alia*, that he was not due the whole amount of rent sued for, as he had not received possession of the whole subjects let.

The value of the goods sequestrated was, according to the inventory, £14, 6s.

On 19th August 1889 the Sheriff-Substitute (BALFOUR) granted decree against the defender for the sum sued for and warrant of sale.

On 14th October 1889 the Sheriff (BERRY) adhered.

The defender then appealed to the First Division of the Court of Session.

The pursuers objected to the competency of the appeal, and argued—The appeal was incompetent, the sum in question between the parties being less than £25. The case of *Thomson* v. *Barclay* was decided on specialties not present in this case. The valuation of the goods sequestrated here amounted only to £14, and there were no conclusions for caution and removing—*The Singer Manufacturing Company* v. *Jessiman*, May 14, 1881, 8 R. 695; *Aberdeen* v. *Wilson*, July 16, 1872, 10 Macph. 971; *Henry* v. *Morison*, March 19, 1881, 8 R. 692; Debts Recovery (Scotland) Act 1867 (30 and 31 Vict. cap. 96), sec. 10; *Dickson* v. *Bryan*, May 14, 1889, 16 R. 673.

The defender argued—The appeal was competent—*Thomson* v. *Barclay*, February 27, 1883, 10 R. 694. (1) The valuation was for the purpose of bringing everything into the sequestration, and it did not follow that the inventory value was the fair value of the goods. In the present case certain items were clearly entered below their full value. (2) The rent sued for was a half-year's rent under a five years' lease, and the pursuers' objection would affect his obligation to pay the full rent for succeeding terms. Thus the amount in question between the parties was really over £25—*Cunningham* v. *Black*, January 9, 1883, 10 R. 441; *Drummond* v. *Hunter*, January 12, 1869, 7 Macph. 347.

At advising—

LORD PRESIDENT—The conclusion of the summons in this case is in the following terms—"That warrant ought forthwith to be granted to inventory, appraise, sequestrate, and, if need be, secure the goods and effects upon or within the said premises; and decree ought to be pronounced decerning the defender to make payment of the said rent to the pursuers, with expenses; and warrant ought also to be granted to sell the goods and effects sequestrated in payment of the said rent and expenses," &c.

Now, it appears to me that there are three heads in that conclusion. First, there is a conclusion for warrant to secure the goods; in the second place, decree is sought