Tuesday, November 4.

FIRST DIVISION.

GRAY *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Liability of Railway Company for Consequences of Escape of Dog Committed to their Charge—Proper Precautions for Safe Custody.

A person brought an action of damages against a railway company on account of having been bitten by a dog which had escaped from their charge. The material facts proved were as follows—The dog was given into the charge of one of the company's guards at Kelso to be conveyed to Perth. He was told that it was quiet. A muzzle was offered for it, but the guard, on being informed that it was not used to being muzzled, preferred to leave it unmuzzled. It had a collar on, with chain attached. The dog showed no signs of bad temper or viciousness, though it snapped at its chain, till it was being led by a porter along the platform at the Waverley Station, Edinburgh, to the Perth train. It then became very excited, bit at its chain and the porter who was leading it, and finally escaped from his charge. The pursuer was employed as a gardener at some public gardens more than a mile distant from the station, and was bitten while turning the dog out of the gardens by order of his superior. The jury returned a verdict for the pursuer.

Held, on a motion for a new trial, that the verdict must be set aside in respect (1) that there was no evidence of *culpa* on the part of the company's servants, and (2) that the company could not be held responsible for such remote consequences of the dog's escape as the pursuer's injury.

On 31st August 1889 a collie dog which was being conveyed by the North British Railway Company from Kelso to Perth escaped at the Waverley Station, Edinburgh, and made its way to the Botanic Garden and Arboretum, a distance of more than a mile, where it severely bit a gardener named William Gray.

Gray brought an action against the railway company, averring that the company's servants when they received the dog were told that it was vicious; that nevertheless they failed to take proper precautions for its safe custody; and that its escape and the injury suffered by the pursuer were due to their negligence and want of care, for which the defenders were responsible.

The defenders pleaded—"(1) The action is irrelevant, and ought to be dismissed. (2) The pursuer, not having received the injuries of which he complains owing to the fault of the defenders, they are entitled to absolvitor. (3) The pursuer having received the injuries of which he complains owing to his having approached the said dog, though it was obviously dangerous to do so, the defenders should be assoilzied."

On 8th February the Lord Ordinary (WELLWOOD) repelled the first plea-in-law for the defenders, and assigned a day for the adjustment of issues.

The defenders having reclaimed, the Court adhered.

The issue adjusted for trial of the cause was as follows—"Whether on or about 31st August 1889, and in or near the Royal Botanic Gardens, Edinburgh, the pursuer was bitten by a dog which had been placed in the defenders' custody for transit from Kelso to Perth or elsewhere, through the fault of the defenders, to his loss, injury, and damage. Damages laid at £250."

The trial took place before Lord Trayner and a jury on Tuesday 22d July 1890.

The following were the material parts of the evidence in the case bearing on the question whether the railway company's servants were in fault in letting the dog escape—William Thomson, a shepherd near Kelso, deponed that he had brought the dog up from a puppy. He had never seen any sign of vice or excitement about it. It was four years old when he took it to the station to despatch it to Perth. He gave the dog to the guard, and told him that it was a quiet dog. He offered the guard a muzzle, but the guard, on hearing from him that it was not accustomed to being muzzled, thought it was better unmuzzled. The dog was quiet and in its usual state when he took it to the station.

The guard of the train corroborated Thomson's evidence, and said further that the dog had a collar and chain. He tied it up in the van in the usual way. It lay very quiet all the way to Edinburgh. At the Waverley he untied it and handed it to George Redford, a parcel porter.

George Redford deponed—"When I got it (the dog) out of the van I did not like its appearance exactly at first. I clapped it. I led it along very gently to the parcel office. I let it stop. After it had stopped a change came over it. It commenced to bite at the chain very much. I took it to the parcel office and tied it up there. It was left there for the next train."

John Ross, parcel deliverer, deponed—"I remember George Redford, the last witness, bringing the dog to the office. It was to go by the 1·17 train to Perth. It came by the train due at 12·10 from Kelso. When it was brought in it had a collar and chain upon it. It was fastened in the usual way at the back in the checker's box to wait for the train. We have kennels for dogs when they have to wait a whole day, but when a dog has just to wait between trains, our practice is to fasten it up in the office. I noticed nothing peculiar about the dog till it was tied up. When it was tied up I noticed that it was very vicious. It seemed to get excited, and snapped at its chain. It did not do any mischief there. About five minutes before one it was time to take the dog to the train. I tried to take it to the train. It went quietly out of the office

at first, and made no effort to bite me when I unloosed it. I went down to the south platform with it. When we got to about opposite the stationmaster's office it began to jump about. It was not very serious; it was just trying to catch hold of its chain. I then began to see that the dog was excited and disposed to bite. I held it by the chain, keeping it at arm's length. It began to try and bite my hand. I held it so that it would not have so much purchase, and kept it on its hind feet. I held it so for three or four minutes, and the whole weight of the dog was on my arm. In the long run I could not hold it any longer, and had to let it go. It overmastered me. It ran down the platform and got between the footboard of a carriage and the platform. I think its hind feet got down on the rails, but did not get right down. I followed it down the main platform, where it crossed the road over to the side of the wall that looks to the Low Calton. It then came to the yard facing the stationmaster's house in the Low Calton. Ultimately it went through the Low Calton, across Leith Walk, into Broughton Street, and away down to the Botanic Gardens. I followed it the length of Warriston Crescent, where I lost sight of it. Another porter—John Luke—was with me. I came back and reported the matter to my superior officer."

The result of the evidence of what took place after the dog reached the Arboretum may be shortly stated as follows — The dog having been observed in the Gardens, Professor Balfour, the Curator of the Gardens, told the gardeners to turn it out. While they were attempting to chase it out its chain got entangled in a railing. It was in a very excited condition. Two gardeners, of whom the pursuer was one, and a clerk in the Curator's office, then approached it. One put the head of a rake through its collar and held its head back, while the other disentangled its chain. They then fastened a rope to its chain and took it to the west gate of the Arboretum, where they left in the pursuer's charge, while the other gardener went for a policeman. Before the policeman came the dog flew at the pursuer, and bit him very severely in the hand. It was afterwards taken to the Dogs' Home, when the veterinary surgeon condemned it, and it was killed.

The jury returned a verdict for the pursuer, assessing the damages at £30.

The defenders applied for a rule, which was granted.

Argued for the pursuer—There was evidence that the dog was in an excited and dangerous condition in the parcel office, and the defenders' servants should therefore have taken more than ordinary precautions to prevent it escaping. His negligence in not taking such precautions was the cause of the dog's escape and the pursuer's injury, and for that negligence the defenders were responsible. There was accordingly sufficient evidence of *culpa* on the part of the defenders' servants to justify the verdict of the jury. The jury were also justified in holding that the pursuer was not in fault in trying to turn the dog out of the Arboretum, because he was acting in obedience to the order of his superior—*Burton* v. *Moorhead*, July 1, 1881, 8 R. 892.

Argued for the defenders—The defenders' servants were not proved to have acted in any way negligently or with a lack of due care. The dog had shown a little impatience at its long restraint, but had shown no signs of bad temper or viciousness till it began to struggle with the porter on the way to the Perth train. The usual precautions for its safe custody were therefore all that were required, and these were taken. There was absolutely no case of *culpa* on the part of the defenders' servants established on the evidence. Further, even assuming that the company's servants had been to blame in the first instance, their remissness was not the immediate cause of the accident, which was clearly on the evidence due to the rough treatment of the dog by the pursuer and the other officials at the Botanic Gardens. On both these grounds, therefore, the verdict was contrary to evidence, and should be set aside.

At advising—

LORD PRESIDENT—My opinion is that this verdict cannot stand, as there is no evidence to support the charge of fault made against the railway company or their servants.

Railway companies are in the habit of carrying dogs or other live animals, and in so doing they are under a certain responsibility, not only towards the owner of the animals, but also towards the public. If a dog is known to be vicious, a railway company is bound to take not only usual but extraordinary precautions with regard to it, but that is not the kind of case here. The averment that the dog was known to be vicious has, I think, been completely negatived by the evidence of the owner and the guard in whose charge the dog travelled from Kelso. It appears to me that what they did was in the circumstances most judicious. The guard was assured by the owner that the dog was a perfectly good-natured animal, but told that if he wished to have a muzzle he might have one, and in the exercise of his discretion the guard said he did not want it. There is no account of anything which occurred in the course of the journey indicating that the dog was vicious or indicating a change of opinion on the guard's part.

In ordinary course the dog was delivered at the Waverley Station, where it had an hour and a quarter to wait for the train to Perth, and in accordance with the usual custom it was chained up in the parcel office. Up to this time there was no appearance of anything being wrong with the dog. Undoubtedly it was a little impatient, as dogs are apt to be on a journey, especially such dogs as collies that are accustomed to plenty of exercise. That was not a thing to excite suspicion or alarm in the mind of anyone accustomed to the habits of dogs. It rather appears that the

porter who conveyed the dog from the parcel office to the train was somewhat new to such work, and not accustomed to the habits of dogs, but I do not know that a railway company must have such qualities as a knowledge of the ways of dogs in its servant. He must be taken as an ordinary man whose chief qualities perhaps are strength and attentiveness to his work. Well, the dog tried to escape, and so far got the better of the porter, as it contrived to frighten him, and got loose from his hold. Down to that time no mischief was done, and nothing definitely amounting to fault on the part of the railway company or their servant has been proved. It is impossible to say that the railway company's servant was guilty of *culpa* in the way he dealt with the dog. There is nothing more or less to be said than that the dog escaped. Is the railway company to be answerable for all the remote consequences of that escape? I think not. If it could be shown that the necessary and immediate result of the escape was the injury of someone it might be a very different case, but it is impossible to conceive anything more remote than the injury suffered by the pursuer. I do not wish to say anything harsh, but I must say that I think that the dog was injudiciously treated at the Arboretum. If I felt obliged to follow the case further, I might say that the cause of the pursuer's injury was produced at the Arboretum. I do not, however, put my decision on that ground. I think it is sufficient to say that there is no evidence of fault on the part of the railway company and its servants.

LORD ADAM—I concur. It was the duty of the railway company to use all due precautions for the safe custody of this dog. Such precautions vary with the circumstances of each case, and if the railway company had been informed, as is alleged, that the dog was vicious, the case would have been quite different. The railway company, however, were not so informed, but, on the contrary, were informed that it was a quiet dog. So the precautions necessary in this case were only those required in the case of a quiet dog,

The dog behaved well till it reached Edinburgh, and was taken to the parcel office at the Waverley Station. The only passage that I can find implying or suggesting any fault on the part of any servant of the company is in the evidence of John Ross, who was examined on behalf of the defenders. He says—"I noticed nothing peculiar about the dog till it was tied up. When it was tied up I noticed that it was very vicious. It seemed to get excited, and snapped at its chain. It did not do any mischief then." The meaning of that is that the dog wanted to be free, and snapped at its chain, but it is not suggested that it was in a wild condition. After an hour and a quarter the porter went back to the parcel office, and found the dog to be quiet. He says—"About five minutes before one it was time to take the dog to the train. I tried to take it to the train. It went quietly out of the office at first, and made no effort to bite me when I unloosed it, and no one can suggest that there was any fault on the part of the witness in taking an apparently quiet dog to the train. On his way to the train, he says—"When we got to about opposite the stationmaster's office it began to jump about. It was not very serious; it was just trying to catch hold of its chain. I then began to see that the dog was excited and disposed to bite. I held it by the chain, keeping it at arm's length. It began to try and bite my hand. I held it so that it would not have so much purchase, and kept it on its hind feet. I held it so for three or four minutes, and the whole weight of the dog was on my arm. In the long run I could not hold it any longer, and had to let it go. He overmastered me." In these circumstances where was the fault on the part of the company? I can see none; and if the case was so put to the jury, as I believe it was, I think there is no evidence to justify the verdict.

That being the case, I do not think it is necessary to go further into the case. I agree, however, that even if the company had been in fault in regard to the dog's escape, they would not be responsible for all the remote consequences of the escape.

With regard to what took place at the Arboretum, the case appears to me to be this. Three of the gardeners had the dog tied to a rope, and if anything happened after that surely they were responsible for it. If it was wrong for the railway officials not to have sent two porters to take the dog to the train, surely there was fault on the part of the gardeners, the dog having shown itself to be vicious, to leave it in the charge of one man. I think their conduct must be held to be the proximate cause of the injury.

LORD M'LAREN—The obligation which the railway company came under in this case is the same as the obligation undertaken by anyone who has the temporary custody of domestic animals—that is to say, an obligation to take all reasonable and ordinary precautions to prevent the escape of animals whose escape may be productive of mischief. What "reasonable precautions" are depends on the kind of animal which is in question. A horse is usually led on a halter; a cow is accompanied by a drover and dog; and a dog usually has a collar put upon it, and is led on a chain,

In this case there was nothing to suggest that the dog was bad tempered, or that more than the usual precautions were necessary, and I think the pursuer has entirely failed to prove fault on the part of the railway company.

I also agree that the pursuer's injury was not the direct and immediate consequence of the dog's escape. It would have been so if the dog had flown at and bitten a passer-by immediately on escaping. Apparently the dog was doing some harm to the flower beds at the Botanical Gardens, and the pursuer's injury was consequent on an attempt to put the dog out of the Gardens.

LORD KINNEAR and LORD TRAYNER concurred.

The Court made the rule absolute, set aside the verdict, and granted a new trial.

Counsel for the Pursuer—Guthrie Smith—G. Watt. Agent—J. F. Edwards, Solicitor.

Counsel for the Defenders — Comrie Thomson—Cooper. Agents—Millar, Robson, & Innes, S.S.C.

Saturday, November 8.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

SELBIE *v.* SAINT.

Reparation — Slander in Judicial Pleadings — Relevancy — Bankrupt — Caution for Expenses.

A landlord ejected from premises a caretaker appointed by a tenant, and in an action of damages at their instance he averred they had commenced to clear the premises with the evident intention of defrauding him of his right of hypothec for rent, and that the caretaker was seldom sober during the time he was in the premises. The caretaker then sued the landlord for damages for slander, but the Court *dismissed* the action as irrelevant, on the ground that the averments complained of being relevant and pertinent to the issue, the pursuer was bound to aver facts and circumstances from which malice could reasonably be inferred.

James Selbie, messenger-at-arms, Peterhead, sued George Saint, grocer there, for £50 as damages for slander, alleged to have been uttered under these circumstances:—John Penny occupied a shop in Peterhead, belonging to the defender, from Whitsunday 1889 to Whitsunday 1890. Penny left the country in October 1889 without paying his rent, and as the pursuer alleged authorised him to take charge of his business. On 11th October 1889 the defender ejected the pursuer from the shop. Penny, and Selbie as his mandatory, then raised an action of damages (which was ultimately withdrawn) against the defender, whose defences contained, *inter alia*, the following statement—"The pursuer (Penny) and Selbie commenced to clear the premises with the evident intention of defrauding defender of his right of hypothec for his rent, but he obtained a warrant from the Court and sequestrated in security some effects which pursuer or Selbie did not manage to remove. Selbie was seldom sober during the time he was on the premises." These statements were the ground of the present action.

The defender alleged that the pursuer was notour bankrupt, and produced in evidence thereof an extract decree for expenses against pursuer and expired charges thereon.

The defender pleaded—"(3) The expressions founded are under the special circumstances not actionable. (4) The pursuer ought to be ordained to find caution for expenses."

Upon 26th June 1890 the Sheriff-Substitute (BROWN) found the action relevant and ordered proof.

Upon 19th July the Sheriff (GUTHRIE SMITH) upon appeal ordained the pursuer within eight days to find caution for the past and future expenses, and on the defender's failure so to do, dismissed the action.

The pursuer appealed, and argued—Caution was unnecessary. Mere impecuniosity was not a sufficient ground. The pursuer in an action of damages for slander was in a specially privileged position, as the action was to vindicate his character. It was averred that the pursuer was notour bankrupt, but that was only in the sense of the Debtors Act 1890, and not of the 7th section of the Bankruptcy Act 1856. It had been decided that such bankruptcy did not necessarily imply that a pursuer must find caution as a condition of suing his action—*Macrae* v. *Sutherland*, February 9, 1889, 16 R. 476. *On the merits*—The words complained of by the pursuer were actionable even although they were part of the record in a judicial proceeding. There was no absolute privilege given to a litigant as there was to other parties called into the case necessarily as witnesses, counsel, or judges. It must be shown that the words used were both pertinent and relevant to the issue. The words complained of here were neither relevant nor pertinent; even if relevant and pertinent, there was enough in the averments to show malice and want of probable cause on the part of the pursuer—*Gordon* v. *British and Foreign Metaline Company*, November 16, 1886, 14 R. 75; *Mackellar* v. *Duke of Sutherland*, June 14, 1859, 21 D. 222, and June 18, 1862, 24 D. 1124; *Munster* v. *Lamb*, July 5, 1883, L.R., 11 Q.B.D. 588.

The respondent argued—No doubt the matter was in the discretion of the Court, but the pursuer ought to be made to find caution for expenses, as this was only one of a series of actions which the pursuer had brought, and which he had either withdrawn or lost. The statements complained of, whether true or false, were at least pertinent and relevant to the issue. If they were pertinent, then no facts and circumstances had been stated from which the Court might infer malice on the part of the defender, and it was decided that that was necessary when the occasion was privileged, as this was, the statements complained of being part of a record in a proceeding in a court of justice—*Williamson* v. *Umphray*, June 11, 1890, 17 R. 905; *Farquhar* v. *Neish*, March 19, 1890, 17 R. 716.

At advising—

LORD JUSTICE-CLERK—This case is before us on an appeal from the judgment of the Sheriff finding that the pursuer must find caution for expenses. I confess that if I