standing the want of warning and the danger he was placed in, have probably escaped any injuries but for said hole or trench. One of his feet slipped into it, and he was thereby unable to get the other clear in time, and a waggon went over one of his legs, close to the knee, and severed it from his body."

He concluded against the defenders for the sum of £1000, with interest thereon, "or otherwise to grant a decree against the said defenders ordaining them to pay to the pursuer the sum of £182 sterling, or such other sum as may be found to be due to the pursuer under the Employers Liability Act 1880."

The pursuer pleaded—"(1) The pursuer having been injured, as condescended on, by and through the fault of the defenders, or those for whom they are responsible, the defenders are liable to the pursuer in the loss, injury, and damage he has thereby sustained. (2) The sum first above concluded for being reasonable compensation and reparation to the pursuer for the injury sustained by him, decree therefor should be pronounced against the defenders, with expenses. (3) Alternatively, the pursuer having been injured while in the employment of the defenders as a workman through the fault of the defenders or of those for whom they are responsible under the Employers Liability Act 1880, the pursuers are entitled to decree in terms of the alternative conclusion of the petition, with expenses."

The defenders pleaded—"The pursuer's statements are irrelevant in so far as the action is based on common law."

Upon 17th June 1891 the Sheriff-Substitute (SPENS) allowed a proof.

"*Note.*—The case is admittedly relevant under the Employers Liability Act, and a proof necessarily falls to be allowed. The question of whether or not there is common law liability, having regard to the fact that an inquiry has to be made into the whole circumstances, is one which, I think, may be left over for determination till after the proof. As something was said about a jury trial, I do not now fix a diet of proof. Pursuer before the 3rd July will make up his mind as to the course to be followed."

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK—In this case I have a clear opinion that the pursuer has not averred any facts which would entitle him to an issue at common law, and that if the action had been brought before the passing of the Employers Liability Act it must have been dismissed as irrelevant. There are a large number of averments, but I am quite satisfied that they do not make out a relevant case. Two of them might be made relevant; one of them is the one averring insufficient light, but unfortunately there is no averment how it was that the insufficient light contributed to the accident. The other one is about an alleged hole into which the pursuer says he fell, and without falling into which he avers he might have escaped. But, as I understand it, the pursuer's case is that this engine should never have been brought into contact with these trucks at all, and it is not easy to see how the insufficiency of the light or the presence of the hole have anything to do with the accident which is alleged to have been caused by the engineman acting in breach of his duty. The defenders cannot be held in fault for a want of light or the presence of a hole, if neither of these could have caused the accident, unless some breach of duty was committed by one of their servants. They were not called upon to provide against such breach of duty. I think therefore there is no case at common law. The pursuer may, however, have an action under the Employers Liability Act under the provision in that Act which makes an employer liable for the fault of a person in charge of a locomotive-engine. He has two conclusions in his action, one for £1000, and one for £182 under the statute. I think therefore we may dismiss the action as laid at common law as irrelevant, and allow an issue under the Employers Liability Act.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Find that the action is irrelevant so far as laid at common law, and dismiss the same so far as regards the first conclusion of the summons: Approve of the issue so far as founded on the Employers Liability Act as the issue for the trial of the cause, and decern, reserving all questions of expenses: Remit the cause to Lord Low to proceed therein as accords."

Counsel for the Pursuer—Shaw—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for the Defenders — Comrie Thomson—C. S. Dickson. Agents—Gill & Pringle, W.S.

Saturday, June 20.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

MACLEOD *v.* MARSHALL AND OTHERS.

(*Ante*, February 27, p. 626.)

Slander—Counter Issue—Diligence—Specification of Documents—Access to Company's Books.

A defender in an action of slander was allowed a counter issue in justification of what he had said, based upon a statement that he had been induced to take shares in a mining company through the false and fraudulent representations of the pursuer. He sought, with the view of establishing the

worthless character of the company and the pursuer's knowledge thereof, to recover by diligence the business books, letter books, and balance-sheets of the company since its formation, for the purpose of making excerpts.

Held (*rev.* Lord Kyllachy—*diss.* Lord Trayner) that he was not entitled to obtain access to these documents.

In this case of slander the defender Marshall was allowed the counter issues given upon p. 630, *ante*, with a view to showing that he was justified in calling the pursuer the names he had used, inasmuch he had been induced by his misrepresentations to take shares in a worthless company. The specification of documents called for by Marshall included, *inter alia*, "13. The business books, letter books, and balance sheets of the Val d'Elsa Copper Company, that excerpts may be taken therefrom of all entries therein relative to the output from its mines, and the income and expenditure in connection therewith since said company was formed, also all reports or statements made to said company relative thereto down to 28th February 1888."

This article was allowed by the Lord Ordinary.

The pursuer reclaimed to the Second Division, and argued—The diligence sought was too wide. The documents called for in this article were not documents to which the pursuer was in any sense a party. The defender, because he alleged two points in justification of the slander, was not entitled to see all the documents connected with this company. *Tulloch's* case relied on by the defender was not in point. There the company's books were allowed to be seen with the view to an investigation as to the state of the company at a particular date.

The defender argued—The Lord Ordinary's judgment should not be disturbed. Counter issues alleging fraud had been allowed, and the defender was entitled to the fullest investigation into the affairs of the company with the view of showing its worthless character and the pursuer's knowledge thereof. There was authority for the diligence asked in the cases of *M'Cowan* v. *Wright*, December 14, 1852, 15 D. 229; and *Tulloch* v. *Davidson's Executors*, July 17, 1858, 20 D. 1319.

The majority of the Court (The Lord Justice-Clerk, Lord Young, and Lord Rutherfurd Clark) disallowed the article.

Lord Trayner—The question raised by this reclaiming-note is, whether the defenders are entitled to a diligence for the recovery of the documents set forth in the specification which they have lodged. It is objected on the part of the pursuer that the diligence sought is too wide, and your Lordships' giving effect to this contention, and differing to some extent from the view adopted by the Lord Ordinary, have limited the diligence. For my own part, I think we should not have interfered with what the Lord Ordinary has done. It appears to me that the defenders are entitled to recover the whole documents specified, as tending to support the counter issue which has been allowed. It is quite possible that the call made for production of the whole business books, balance-sheets, &c., of the Val d'Elsa Copper Company might have been open to an objection on the part of the company, whose objection, if taken, would have been dealt with by the Commissioner or the Lord Ordinary. But the pursuer does not appear to me to have any right to state or insist in such an objection. The real question to be tried in the case is whether the Val d'Elsa Company at its inception and since has not been more or less a swindle, in the knowledge of the pursuer, who was inducing the defenders to become shareholders thereof to his pecuniary advantage and their detriment. In such a case I would have allowed the fullest investigation into the affairs of the company not inconsistent with the interests of innocent shareholders. Such interests would, I think, have been perfectly safe in the hands of the Commissioner or Lord Ordinary if at any time they were threatened by the execution of the defenders' diligence.

Counsel for Pursuer and Reclaimer—Asher, Q.C.—H. Johnston. Agents—Smith & Mason, S.S.C.

Counsel for Defender—Graham Murray—M'Clure. Agents—J. & J. Ross, W.S.

Friday, June 26.

FIRST DIVISION.

[Dean of Guild, Edinburgh.

LAWRIE *v.* JACKSON.

Process—Appeal—Dean of Guild—Refusal to Sist Party to a Petition.

Held that an interlocutor of the Dean of Guild refusing to sist as a respondent to a petition a person alleging a material interest to appear, was a final interlocutor *quoad* that person, and therefore appealable.

Property—Building Restrictions—Application to Dean of Guild for Authority to Erect New Buildings—Right of Neighbouring Proprietor to be Sisted as Party to the Process.

A proprietor applied to the Dean of Guild for authority to take down a villa, and erect on the site thereof tenements of shops and dwelling-houses. The petition was served on the proprietors of the immediately adjoining properties, and, among others, upon the proprietor of the nearer half of a semi-detached villa which adjoined the petitioner's property on the south, and answers were lodged objecting to the proposed erections on the ground that they would violate conditions as to building contained in the titles both