sideways, he must have squeezed himself in deliberately, not in order to be served at the counter, but as I read the evidence, to continue his jokes with the boy. I think it sufficiently appears that the passage was not a place where customers were invited or intended to stand. I must add that I do not think it proved that the pursuer was the worse of drink.

It is a fair jury question whether this recklessness on the pursuer's part materially contributed to the accident. The Sheriff thought it did, and I see no sufficient grounds for differing from him.

If damages are to be given, I think the sum proposed is moderate.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for parties on the appeal, Sustain the same, and recal the interlocutor appealed against: Find in fact (1) that on the occasion in question there was a hatchway left standing open 11½ inches back from the outer edge of the counter, and 5 feet 6 inches from the inside of the entrance door of the defender's shop; (2) that the pursuer, when standing at the counter, lost his footing in consequence of the hatch being open, and fell down the hatchway; that his shoulder was dislocated by the fall, and that he received a severe shock to his system; and (4) that the pursuer's fall was due to the fault of the defender in leaving the hatchway open and unguarded: Therefore find the defender liable to the pursuer in damages, and assess the same at the sum of £25, for which decern against the defender: Find the pursuer entitled to expenses in this and the inferior Court," &c.

Counsel for the Pursuer and Appellant—A. S. D. Thomson—Munro. Agents—David Forsyth, Solicitor.

Counsel for the Defender and Respondent—Dundas. Agents—J. Gordon Mason, S.S.C.

Saturday, October 31.

FIRST DIVISION.

[Sheriff of Lanarkshire.

M'INTOSH *v.* WADDELL.

Reparation — Negligence — Leaving Horse Unattended in Street.

The pursuer in an action of damages averred that the servant in charge of a horse and van belonging to the defender left the same unattended in the street, and that the animal bolted and dashed into the pursuer's shop window, causing considerable damage. The defender maintained that the action was irrelevant, in respect that the mere averment that the horse was left unattended in the street did not necessarily imply fault. *Held* that the pursuer was entitled to an issue.

James Duncan M'Intosh, jeweller, Glasgow, raised an action in the Sheriff Court of Lanarkshire against R. D. Waddell, sausage manufacturer, Glasgow, concluding for payment of £130.

The pursuer averred that on 11th October 1895 the defender was the owner of a spring van and a pony, that at a certain hour on that day the servant of the defender who was, or ought to have been, in charge of said vehicle and animal, left the same unattended in a certain street, and that the said animal bolted and dashed into the window of the pursuer's shop breaking the window and damaging his stock, and thereby creating great damage and loss, and also great damage, loss, and inconvenience to the pursuer's business.

The pursuer further averred—"(Cond. 4) The said animal attached to said vehicle was, contrary to the Glasgow Police Acts 1866 and 1895, and particularly section 149, sub-section 22, of the Glasgow Police Act 1866, left by defender's servant in said street unattended, and being, as known to the defender, a spirited animal, it should not have been so left. (Cond. 5) The said accident was caused by the fault of the defender or his servants, for whom he is responsible, in respect that the said animal while attached to said vehicle was left unattended as it should not have been, and contrary to the Glasgow Police Act, more especially as said animal was known by the defender to be spirited."

The Sheriff-Substitute (ERSKINE MURRAY) having allowed a proof before answer, the Sheriff (BERRY) adhered.

The pursuer appealed to the Court of Session for jury trial under the Judicature Act 1825 (6 Geo. IV. cap. 120), sec. 40, and proposed issues.

Argued for the defender—The action was irrelevant and ought to be dismissed. (1) No relevant ground of fault was specified. It was not in itself a fault to leave the horse unattended for a few moments—*Shaw* v. *Croall & Sons*, July 1, 1885, 12 R. 1186; *Hayman* v. *Hewitt*, Peake's Addl. Cas. 170, *per* Lord Kenyon 171. To make his case relevant, the pursuer should have averred that the servant had left the horse and cart for a certain period of time, or, *e.g.*, in order to go into a public house. The reference to the Glasgow Police Acts, without specification of how they were contravened, could not make the averments relevant.

Argued for the pursuer and appellant—The risk of leaving a horse unattended must always be borne by the party owning the animal — *Illidge* v. *Goodwin*, 5 C.P. 190, *per* Tindal, C.-J., at p. 192; *Morrison* v. *M'Ara*, March 6, 1896, 23 R. 564, *per* Lord Young at p. 568.

LORD PRESIDENT—The Court think the case must go to trial before a jury.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of an issue.

Counsel for the Pursuer and Appellant—Salvesen—J. Purves Smith. Agent—T. C. Smith, S.S.C.

Counsel for the Defender and Respondent—Ure—Cook. Agents—Simpson & Marwick, W.S.

Saturday, October 31.

FIRST DIVISION.

[Dean of Guild Court, Leith.

KING *v.* BARNETSON.

Servitude—Negative Servitude—Servitude of Light and of Use of Drains—Grant by Implication—Prescription.

A superior feued to a vassal B a portion of ground, "on which ground or stance the said" B "is now erecting a tenement, the plan of which has been approved of by" the superior's architect. After the lapse of the prescriptive period, an adjoining feuar, K, holding of the same superior, applied for warrant to erect a tenement which would block up certain of the windows in the tenement erected by B, and deprive him of the use of certain drain-pipes attached to the back wall of his building.

B opposed the application, and pleaded (1) that a servitude of light in favour of his tenement was to be implied from the terms of his feu-contract, and from the plan relative thereto; and (2) that he had acquired by prescriptive possession a right to the use of the drains.

Held that both pleas were invalid.

In February 1896 William Falconer King, engineer, Leith, presented a petition in the Dean of Guild Court of that burgh for authority to pull down certain buildings in Commercial Street and erect in their stead a tenement five storeys high and fifty-two feet deep.

Among the respondents called was George Barnetson, the proprietor of a tenement at the corners of Commercial Street and Admiralty Street, He lodged answers to the petition, objecting that the proposed building would interfere with the light enjoyed by certain windows in his property, and with certain soil and drain-pipes placed against his back wall.

The petitioner and the respondent derived their right from a common superior. The feu-contract granted to Green, the respondent's author, in 1851 disponed certain portions of ground with definite boundaries in Leith, "on which ground or stance the said George Green is now erecting a tenement, the plan of which has been approved of by Patrick Wilson, architect in Edinburgh."

The respondent averred—"(Stat. 4) It was a condition of the contract between the respondent's author, the said George Green, and the petitioner's author, the said John Archibald Campbell, that in order to admit of light and air being introduced into the back rooms of said tenement the said George Green should be entitled to form windows in the back wall of his tenement overlooking the ground then belonging to the said John Archibald Campbell, upon which the petitioner now proposes to erect his new buildings. It was further agreed that the said George Green should be entitled to place the soil and other pipes connected with said tenement against the back wall thereof, and the same were put up accordingly. The plan of said tenement shewing said windows and pipes was duly submitted to and approved of by the petitioner's author, the said John Archibald Campbell, and in order that said condition and agreement might be observed in all time coming, the said plan is specially referred to in said feu-contract. The respondent's author thereby acquired for himself and the proprietors of said tenement for the time being a servitude of light and air over said back ground now belonging to the petitioner, and a right to maintain said soil and other pipes against the back wall of the tenement. The said pipes have been in their present position for over forty years without objection on the part of the petitioner or his authors, and the respondent has a right of servitude over the subjects belonging to the petitioner, by virtue whereof he is entitled to maintain said pipes in their present position, and to get access thereto on all necessary occasions."

The petitioner answered to this—"The feu-contract is referred to. If there was any other agreement between the said John Archibald Campbell and the said George Green, it is unknown to the petitioner, and the respondent is called on to produce it."

The petitioner pleaded, *inter alia*—"(7) The answers of the respondent George Barnetson, so far as founded on the alleged servitude, are irrelevant. (8) The pipes referred to are an encroachment on the petitioner's ground, beyond the express boundaries of the respondent's property, and he has no right to resist their removal."

The respondent pleaded—"(1) The respondent having under his titles, and particularly under the feu-contract before mentioned and plan therein referred to, a servitude of light and air over the petitioner's back ground, and a right to maintain said pipes in their present position, is entitled to prohibit the petitioner from erecting his proposed buildings in so far as they would interfere therewith. (2) The said pipes having been in their present position for upwards of forty years, and the respondent having a right of servitude in relation thereto, the petitioner is not entitled to interfere therewith or to prevent the respondent from getting access thereto."