COURT OF SESSION.

Tuesday, November 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'EWAN *v.* CUTHILL.

Reparation — Negligence — Leaving Horse Unattended — Dangerous Place — Undue Absence.

A carter who had been ordered by his employer to deliver goods at a country shop, left his horse and cart at the door of the shop in order to inquire where the goods were to be put. To accomplish this he had to pass into (or almost into) a back shop out of sight of his horse. The shop was in close proximity to a railway bridge, and while the carter was inside the shop, the horse was startled by a train passing below the bridge, with the result that it ran off and knocked down and injured a person on the road. In an action raised by her against the carter's employer, it was proved that the horse was in ordinary circumstances quiet, and was accustomed to work near railways. *Held* (*diss.* Lord Trayner) that the defender was liable to make reparation to the pursuer.

On 15th May 1896 David Shanks, a servant in the employment of John Cuthill, potato merchant, Airdrie, left Airdrie in charge of a horse and lorry laden with potatoes, to be delivered at, among other places, the Clydesdale Store, Mossend. The store is situated 5 or 6 yards from a bridge over the Caledonian Railway. On arriving at the store Shanks drew his horse and lorry up to the door. He then entered the store and went through the front shop towards the back shop for the purpose of seeing where the potatoes were to be placed. While entering the back shop he heard the whistle of an engine, which at that time was passing under the railway bridge. At the same moment the shopman in the front shop said to him that his horse had started off, and he ran out to secure it. The whistle had frightened the horse, which ran over the bridge and down the country road past Milnwood Row, Mossend, for about 100 yards. It was there caught by Shanks and another man. When the horse started off a boy about three years of age, a child of Mrs Elizabeth Fairlie or M'Ewan, wife of Hugh M'Ewan, miner, residing at 8 Milnwood Row, was playing by the hedge on the other side of the road from the door of his father's house. On hearing some-one shout Mrs M'Ewan came out of her house, and, seeing the horse and lorry approaching, ran across the road to pick up the child. She had picked up the child, and was standing at the side of the road when the runaway horse swerved in passing her, and she was knocked down and injured. The horse was an ordinarily quiet and docile animal, and was accustomed to cart goods from railway stations without showing any fear of the starting or passing trains.

Mrs M'Ewan raised an action of damages for £250 against John Cuthill, and pleaded —"(1) The accident libelled having taken place through the fault or negligence of the defender or of his servant, for whom he is responsible, and pursuer having sustained the injuries condescended on in consequence thereof, decree should be granted as craved."

After a proof establishing the facts above stated and the nature of the injury, the Sheriff-Substitute (MAIR) on 3rd March 1897 pronounced the following interlocutor: —"Finds (1st) that on 15th May 1896 the pursuer was knocked down by a horse and van belonging to the defender, and that she was injured (though not so seriously as she alleges) in consequence thereof; and (2nd) that the pursuer has failed to establish fault on the part of the defender or his servant, for whom he was responsible: Therefore assoilzies the defender, and decerns," &c.

Note.—"After a careful consideration of the proof I have come without difficulty to the conclusion at which I have arrived, namely, that unfortunate as the accident was, it was an accident, and that neither the defender nor his servant were in any way to blame. [*Here followed statement of the facts.*] That only leaves the question as to whether the defender's servant was in fault in leaving his horse unattended when he went into the store, and it is contended by the pursuer that he was, and that the defender ought to have supplied a boy to go with his servant for the purpose of attending to the horse in his unavoidable absence. Now, I am unable to agree with this contention when I consider the purpose for which the driver left his horse, and the very short time he was absent, nor do I think it necessary, provided the horse is quiet, thoroughly trained, and accustomed to the work, that there should be two persons in charge of each horse and lorry that goes out. The opinions of the judges in *Shaw* v. *Croall & Sons*, 12 R. 1186, are very instructive as to the duty of one in charge of a horse, and the case *M'Gee* v. *Sproull*, January 21, 1890, 6 Sheriff Court Rep. 116, is also founded on by the defender, and I think has some bearing on the present case."

The pursuer appealed to the Sheriff (BERRY), who on 18th June 1897 adhered. The following note was appended to his interlocutor:—"After considering the proof I have come to be of opinion with the Sheriff Substitute that fault cannot be held to attach to the defender or his servant in regard to leaving the horse and van unattended at the door of the Clydesdale Store on the occasion in question. It was frankly admitted at the argument on the appeal that nothing could be said against the character of the horse. The proof, indeed, shows that it was an ordinarily quiet and well-trained animal, and had been accustomed to work in connection with railway traffic. Had this been otherwise, and had the horse been a stranger to railway noises, the case

might have been different, and it might have been regarded as a negligent act to leave the horse so near to a railway bridge without some-one to keep it from starting off. But in the circumstances I cannot think that there was negligence. The defender's servant, who had worked the horse for nearly a month before the accident, and had confidence in his steadiness, had, after drawing up at the door, gone into the store to see where the potatoes he was to deliver were to be put. For that, which was a perfectly legitimate purpose, he had got nearly into the back shop, when a railway engine at the bridge gave a whistle causing the horse to start off along the road, with the result that the pursuer, in trying to save her child, was knocked down and injured. I do not think that a carter is bound never to leave his horse alone even for the shortest time, and that he must always have someone to hold it should his duties call him away for a few moments. The defender's servant here seems to have acted in a usual way and with all ordinary caution in drawing his van up at the store aside from the line of the public road, and coming off it as he did in order to carry out the purpose of his call. In leaving the horse standing he did not anticipate, and to all appearance had no reason to anticipate danger. The defender has in my opinion been rightly assoilzied."

The pursuer appealed, and argued—(1) Where a person leaves a horse unattended in a street or road, he does so at his risk, and is liable for any damage that may arise from his so doing—*Illidge* v. *Goodwin*, 1831, 5 C. & P. 190; *M'Intosh* v. *Waddell*, Oct. 31, 1896, 24 R. 80. Leaving his horse unattended was a breach of duty on the part of the carter, and was a relevant criminal charge—*Her Majesty's Advocate* v. *Ross*, April 14, 1847; *Arkley*, 258. The length of time during which the carter was absent was unimportant, as the risk was there all the time—*Morrison* v. *MAra*, March 6, 1896, 23 R. 564. (2) At any rate the defender was responsible in the special circumstances of this case. The place where this horse and cart was left was within a few yards of a bridge under which railway trains were liable to pass, and therefore a specially dangerous spot at which to leave a horse unattended. The carter also went, not merely into the shop, and through it to the back premises, where it was impossible for him to see his horse.

Argued for defender—(1) Merely leaving a horse and cart standing in the street does not necessarily involve the owner in damage for accident caused by the horse running away. There was no liability *ex dominio*. The principle on which the liability of the owner is founded is that he is bound to take precautions against any injurious act which he might reasonably expect the animal to commit—*Shaws* v. *Croall & Sons*, July 1, 1885, 12 R. 1186. On principle it was not necessarily a fault to leave the horse and cart at a door in order to deliver part of the load. It would be a serious burden on small dealers if they had to send a boy round with every cart to hold the horse while the carter was delivering the goods. The case of *Illidge* was special, as the horse was a spirited animal and given to backing. In *Morrison* the carter was *versans in illicito*, as he was contravening a bye-law. In *Mackintosh* the only question was as to the issue to be allowed. (2) In the special circumstances of the case there was no fault on the part of the defender's servant. It was not a street in a crowded town, but a country road. The horse was accustomed to see and hear railway trains, so that there was no reason to believe that the whistle of a passing train would frighten it. The interlocutor of the Sheriff should be adhered to.

At advising—

LORD JUSTICE-CLERK—This case, like all such cases, depends very much upon the circumstances as regards its legal result. There may be circumstances in which the driver of a vehicle may leave his horse unattended in order to go to the door of the house at which he has pulled up without incurring liability for injury caused by the horse running off while his back was turned; on the other hand, there may be circumstances in which he or his master would incur such liability. The question whether the driver was in fault or not, in doing what he did, is very much a question of degree, depending on the position of the vehicle, the character of the horse, and so on. What may be done by a driver in one case without fault may in another case infer fault. Where there is no vehicle but only a horse, it may be said that the person in charge is not entitled to leave the horse unattended at all—that he does so at his own risk—since it is well known that a horse which has no load behind it can get off at such a speed and so suddenly, that no one, however sharply he may turn round, could catch it before it gets out of reach of capture. Every case, however, depends, as I have said, on its own circumstances; there is no general rule. I cannot assent to the idea that anyone in charge of a horse who left the horse for a temporary purpose and for a short distance, necessarily did so at his own risk, or at the risk of his master, if anything should happen. It is well recognised, according to ordinary practice, that such a thing may be done practically without any risk, and indeed sometimes must be done, and any rule requiring the man always to be at the horse's head or holding the reins would be incompatible with the carrying on of ordinary business. I only give one instance in illustration of that—the case, namely, of a driver plying for hire in this city, and I suppose in the other burghs of Scotland, who is required by the terms of his licence to assist a passenger arriving with luggage in getting the luggage taken to the house. Of course he cannot do that if he remains at the horse's head or on the box holding the reins. It is another question how far the driver is to go in giving this assistance; that again is a question depending on the circumstances of the particular case.

In the present case the circumstances are peculiar in two respects. In the first place, the spot at which the horse was left standing unattended was a place somewhat dangerous in itself. It was near a railway bridge, under which trains went at some speed, and often making a good deal of noise from whistling and otherwise. It is quite true that horses get accustomed to trains, and when they see the trains are not alarmed, but it is well known that even horses which have become accustomed to trains are apt to start when they cannot see the train, but merely hear the loud noise; and accordingly this was a locality as to which it is reasonable that a driver should take special precautions to prevent his horse from bolting. The other special circumstance in the present case was this, that the driver did not leave his horse merely for the purpose of crossing the pavement and going to a door, since, according to his own statement, he was in the act of going into the back shop at the time the horse bolted. Now, I am not prepared to say that a driver who leaves his horse unattended on the public street, goes into a shop, and thence passes into a back shop, is taking reasonable and proper precautions for the safety of the public. We all know that a horse with a vehicle cannot get off absolutely at once, however sudden the plunge which it makes may be; there is always some interval before it gets clear away; and therefore if the man is within easy reach, in ninety-nine cases out of a hundred he is able to catch hold before the horse can bolt away. But if he has gone into a back shop he cannot see, and probably he cannot even hear, the horse starting, and even if he does hear there is a great risk that he will not be able to get out in time to prevent the horse from escaping.

On the whole matter, although there is not perhaps much moral blame to be attributed to the man, still I think that there was culpable neglect of duty in going into the back shop. leaving the horse unattended at a place where it might suddenly be alarmed by the noise of a passing train. I am therefore unable to come to the same conclusion as the Sheriffs. I propose to your Lordships to recal their judgments and to award a sum in name of damages to the pursuers, and it seems to me that £50 would be the proper sum to award.

LORD YOUNG—In consequence of the judgment of both the Sheriffs being in favour of the defender, and an impression which I rather formed to the contrary when hearing the case argued, I have read the evidence in this case with all the care and attention in my power.

It is not suggested that the pursuer was in any way to blame for the injuries which she received, and if no one else is in fault, then it is a case of unavoidable accident. If that be so, we are constrained, in accordance with the principles of our law, to hold that it was a risk incidental to the carrying on of a business, which does not involve responsibility in damages to the public, since it is not in accordance with our law to hold that there is pecuniary responsibility to the public for the consequences of risks incidental to the carrying on of business, even where it is carried on at a profit, unless there is fault on the part of the person carrying on the business. The person who suffers must bear the consequences himself unless there is fault on the part of the person carrying on the business. Therefore in all these cases the question is, Has fault been established? If there is no fault on the part of the defender, or those for whom he is responsible, then so far as he is concerned it is a mere accident and he is not liable in damages.

The real question here is whether we can on the evidence affirm that this horse and lorry were left unattended by the defender's servant to the danger of the lieges. The defender is in the habit of sending lorry-loads of potatoes for delivery at shops and stores, and he tells us that it is in accordance with his method of conducting his business that his lorryman, when he gets to a shop or store, may leave his horse and lorry unattended and go into the shop or store, and go through the front apartment into a back part of the building, if that is necessary in order to get instructions. He says that he does not consider that the lorryman was in fault in leaving the horse and lorry unattended in such circumstances, and if the horse bolts when the man is away, the defender is of opinion that there is no fault on the man's part, and none on his own for allowing or instructing his servant to carry on the business in this way, and that there was no danger to the lieges to which they ought not to have been exposed. Now, I am not prepared to assent to that. I think that the defender ought so to conduct his business that his servants do not require to leave his horses unattended on the public street while they go into back shops in order to transact business with persons inside, and that if he does not so conduct his business, and injury to the lieges results, then I think he is in fault, and is liable in damages for the consequences of that fault.

Your Lordship has said that it is a question of circumstances. I assent to that, but I am not prepared to consider any circumstances except those which we have here. I think that if the lorryman needed to communicate with those in the back shop he ought to have called out and brought someone to him, or if he could not do that he ought to have got someone, or his master ought to have provided someone, to attend to the horse while the lorryman was inside. It would have been a graver fault if the lorryman had not only gone into the back shop but had also gone up a stair. That would have been a graver fault, but only a graver fault of the same kind as that which we have here. It is, I think, a sufficient case of leaving a horse and lorry unattended to the danger of the lieges that the lorryman did what he actually did. When he was in the back shop someone told him that his horse had gone off; he rushed out after it, but he was

not in sufficient time to prevent the accident. That shows, I think, that he exposed the lieges to a danger to which they ought not to have been exposed. I quite agree that regard must be had to the locality in which the horse was left unattended, and the locality here was close to a railway bridge, where a train, as the Sheriff-Substitute puts it, quoting, I think, from one of the witnesses, "screeched" in passing. I think that such a locality was a dangerous locality to leave a horse unattended. We all know that horses are apt to be startled by the whistle of a railway train.

I am not prepared to adopt the illustration — I quite understand that your Lordship mentioned it as an illustration merely —of a cabdriver arriving at a house with luggage. I am not aware that it is the duty of a cabdriver to carry luggage into a house. The house may be up a stair or down a close, and there can be no duty on the part of the cabdriver beyond taking the luggage to the front door, when the door is in immediate proximity to the spot at which his horse is standing. He may do that—taking the luggage up the front steps if there are any, but not inside the door—because he can do so much with perfect regard, in a reasonable sense, to the safety of the lieges. But that is quite a different case from that which we have here. The horse and lorry were left at a place where the horse was startled by the whistle of an engine—a thing which the lorryman might and ought to have anticipated as reasonably probable — the lorryman meanwhile went away from the horse into a backshop, and the horse took fright and caused danger to the life and limb of the lieges before the lorryman could get out of the shop and overtake it. I am of opinion that in these circumstances the lorryman did not show sufficient regard to the safety of the lieges. I am therefore prepared to affirm that there was *culpa* on the part of the defender in conducting his business in such a way as not to be compatible with the public safety. I do not consider it to be of importance that such risks are daily run, and seldom with the calamitous results which we have here, but when these risks do lead to calamities—small or great—it is the risk of the persons through whose *culpa* the calamity took place, although the chances may have been very much in favour of no harm following. It is at their risk that the thing was done, and if anyone suffers they are responsible.

LORD TRAYNER—It was maintained for the pursuer, not as necessary for her success in this case, but as a general proposition sound in law, that where a horse and cart or horse and carriage is left on the highway or other public place, and the horse runs off and inflicts damage, that the owner is responsible for that damage, no matter for how short a time, or for how necessary a purpose, the driver or person in charge of the horse and vehicle had left it. I think the proposition so maintained unsound and inconsistent with the views expressed by the Court when deciding the case *Shaw* v. *Croall*, 12 R. 1186. I think every case of the kind now before us must be determined according to its circumstances. A driver may be very much to blame for leaving his horse and carriage; he may, on the other hand, not be to blame at all. The liability for damage arising from, or occasioned by, the leaving of the horse and carriage by the driver depends, according to my opinion, upon the view which the Court may take of the driver's conduct. If it amounted to *culpa*, if it was blameworthy, liability for damages occasioned by that conduct will be incurred, but, if otherwise, not. In the present case I agree with the Sheriffs. I think the conduct of the driver here was not culpable or blameworthy. On the contrary, I think he acted reasonably, and with the ordinary prudence and caution which was to be expected of him.

I am therefore unable to concur in the judgment which your Lordship has proposed.

LORD MONCREIFF — I agree with the majority that the pursuer is entitled to damages. Up to a certain point the evidence is in favour of the defenders. The horse seems to have been well trained, and not to have previously shown restiveness when in the vicinity of railway trains or traction engines. The driver I have no doubt did not anticipate danger. The result, however, showed that his confidence was not well founded, because the horse undoubtedly took fright at the whistle of an engine and bolted.

I agree that the mere fact that the carter left the horse and cart is not necessarily sufficient to infer liability, but having left it standing only five or six yards from a line of railway, I think he was bound to remain within sight of it, and sufficiently near to run to its head and get it under control if it became restive. But instead of doing this he went into the Clydesdale Store and passed through the front shop, and was nearly into the back shop when the whistle sounded and the horse bolted. If the carter had been standing at the door of the store within sight of the horse, in all probability the accident would never have occurred. I think there was negligence on his part, and that therefore his employer, the defender, is liable in damages. I agree that £50 will be enough.

LORD JUSTICE-CLERK—With reference to what Lord Young has said as to the duty of a cabman with luggage on his cab, I wish to say one word in explanation of my opinion. I did not mean to suggest in what I said that it was the duty of the cabman to take the luggage into the house beyond the door and it might be up a stair. All that he is bound to do is to assist in loading and unloading and in taking the things as far as the door.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutors appealed against: Find

in fact (1st) that on 15th May 1896 the pursuer was injured in her person by a horse and van belonging to the defender; (2nd) that the injury was caused by the said horse and van having been left unattended by the defender's servant in the public street, and at a place in close proximity to a railway, and that this was a dangerous place in which to leave the horse and van unattended; (3rd) that the said horse bolted when left so unattended: Find in law that the said accident was caused by the fault of the defender's servant, for whom the defender is responsible: Find the pursuer entitled to damages, and assess the same at the sum of £50 sterling, and decern the defender to make payment to the pursuer of the sum of £50, with interest thereon at the rate of £5 per centum per annum from this date until payment."

Counsel for the Pursuer—Dundas, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

Counsel for the Defender—Salvesen—Hunter. Agent—W. B. Rankin, W.S.

Wednesday, November 17.

FIRST DIVISION.

[Lord Low, Ordinary.

KENDRICK AND OTHERS *v.* BURNETT AND OTHERS.

Foreign — International Private Law — Delict on High Seas—Lex Fori—Lex loci delicti commissi.

Where the alleged cause of action depends upon facts which have occurred on the high seas, the legal relation which results from it is to be determined by the personal law of the parties concerned, and not by the law of the country in which the action happens to be brought. Where, in such circumstances the personal laws of the parties differ from one another, the action cannot be maintained unless the pursuer is by the law of his domicile entitled to what he claims, and unless the defender is also liable, by the law of his domicile, to the claim made against him.

Rule of the Antwerp Congress of 1885 as to liability arising from collision on the high seas, *adopted.*

In a collision on the high seas, the "Firth of Solway" was run into and sunk by the "Marsden," and persons on board the former vessel lost their lives. Certain of their relatives raised an action for damages and *solatium* in the Scottish Courts against the owners of the "Marsden." Some of the pursuers were domiciled in Scotland and some in England. All the defenders were domiciled in England. The defenders did not object to the jurisdiction of the Scottish Court, but pleaded that their liability to make reparation to the pursuers ought to be determined by the law of their domicile, and averred that by English law no claim for *solatium* was recognised. The pursuers pleaded that the question being a matter of remedy for wrong done, ought to be determined by the law of Scotland as *lex fori.*

Held (*reversing* the judgment of Lord Low, Ordinary) that the defenders' liability could not be made to exceed that imposed upon them by the law of England.

On 19th April 1896 the barque "Firth of Solway" was run into and sunk by the 'Marsden" in the Irish Channel, nine or ten miles east of the Kish Lighthouse, and outside the territorial waters of the United Kingdom.

On 20th April the "Marsden" was arrested at Glasgow at the instance of the owners of the "Firth of Solway," as pursuers of an action of damages subsequently raised in the Court of Session against the owners of the "Marsden," and an action for limitation of their liability was raised in the Court of Session by the owners of the "Marsden." The jurisdiction of the Court was not disputed.

On 23rd September Edward Ruthven Kendrick, master of the "Firth of Solway," and others, raised an action of damages against John Walter Burnett and others, the owners of the "Marsden," for injuries received in the collision, and for *solatium* in respect of the deaths of certain of their relatives by drowning in consequence of the collision.

Of the pursuers, some were described in the instance as resident in England, some as resident in Scotland, one as resident in Ireland, and one as resident in Norway. The defenders were all described as resident in England.

The case was argued and decided on the footing that the parties should be taken to be domiciled in the country in which they were described as resident.

The pursuers, after averring that the collision was due entirely to the fault of those in charge of the "Marsden," proceeded—"(Cond. 5) In consequence of the said collision and consequent loss of said lives and personal injury, the pursuers have suffered loss and damage, and each of them is entitled to reparation and *solatium* in respect of the deaths of their several relatives as before condescended on."

The defenders denied that the pursuers had any claim upon them for *solatium.*

The pursuers pleaded, *inter alia*—"(1) The pursuer Edwin Ruthven Kendrick having been injured in his person, and his wife and daughter having been killed by or in consequence of the said collision, and the defenders being liable in reparation therefor, he is entitled to decree for £3000 as concluded for. . . . (3) By the laws of England and Ireland each of the pursuers is entitled to damages in respect of the loss of life of their respective relatives as before condescended on . . . all of said deaths and injury