poor-rates were imposed on him not in respect of any mere personal ground of liability but in respect of his proprietorship of the lands.

At advising—

LORD TRAYNER—It has been settled by a series of decisions that a clause such as that which we are here asked to construe can be held only as covering those burdens and assessments which affected the land at the date of the grant, and that the clause does not impose on the superior an obligation to relieve the vassal of any assessments or burdens laid upon the land by subsequent legislation, notwithstanding that in expression the clause does provide for all burdens that "shall hereafter become due and payable" for or furth of the lands. That being the meaning and effect of the clause, it only remains to ascertain what public burdens or assessments affected the land in 1803. It is admitted by the first party that the poor-rates, so far as payable by the owner (although not the proportion payable by the tenant) fell within the clause. So far as the tenant's proportion of the poor rates is concerned it was conceded by the second party that he could not maintain his right to be relieved of that. As regards the poor-rates, therefore, the parties are agreed.

The property-tax raises a question which is not unattended with difficulty. That tax was first imposed by the Act 39 Geo. III. c. 13, and was there described as a "contribution for the prosecution of the war." A part of it, however—and no inconsiderable part—was by the Act authorised to be applied to the public services "voted by the Commons." This tax, which expired in 1816, was revived in 1842 (5 and 6 Vict. c. 35), but was so revived to defray Her Majesty's "public expenses" only. In these circumstances the question arises, is the tax of 1842 the same tax as was a burden on the land in 1803. This question I am disposed to answer in the affirmative, because the incidence of the two is the same—they were payable according to the annual rent—and the purposes to which the tax might be applied are to a large extent the same. But then the tax of which the second party seeks relief appears to me to be a personal tax on the income derived from the land rather than a tax payable "for or furth of the land" itself. On this ground I am of opinion (but not without considerable hesitation and doubt) that of this tax the superior is not bound to relieve the vassal.

The whole of the other assessments mentioned in the special case appear to me to have been imposed by supervenient legislation, and therefore not covered by the clause in question.

LORD YOUNG concurred.

LORD MONCREIFF—Except in one particular I agree in the opinion expressed by Lord Trayner. The decided cases are too strong for the second party. According to the natural construction of the words used in the clause on which he relies it imports an obligation on the superior to relieve the vassal by himself paying all burdens "payable for or furth of" the lands feued, however and whenever imposed, whether under existing or future statutes, and an assurance that the feuar should pay nothing but feu-duty and duplication. But this is not the way in which similar clauses have been construed by the Court. I can find no substantial difference between this clause and those in decided cases which were held to be confined to burdens existing at the date of the grant. It may be somewhat fuller and more emphatic, but that is all.

I am of opinion, however, that under the clause in question the first party is bound to relieve the second party, not only of poor-rates but also of property-tax. Both of these rates and taxes, or rather the equivalents, were exigible in 1803 at the date of the feu-charter. They are both personal taxes in this sense, that they are not *debita fundi;* so indeed is the land-tax. But they are due and payable by the proprietor of the land for the time being, in respect of his right of property in the land, and thus in my opinion are, in the sense of the clause of relief, burdens due and payable "for" if not "furth of" the said lands.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Trayner.

The Court answered the first question in the negative and the second question in the affirmative and found it unnecessary to answer the third question.

Counsel for the First Party—Dundas, Q.C. — Blackburn. Agents — Dundas & Wilson, C.S.

Counsel for the Second Party—Craigie. Agent—William Duncan, S.S.C.

Wednesday, July 13.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GEORGE MILNE & COMPANY *v.* NIMMO.

Reparation—Negligence—Safety of Public —Horse Escaping into Public Street.

An employer's horses were yoked and his vans loaded in a private yard separated from the street by a covered pend 40 yards long and 8½ to 10 feet wide, with a shut gate next the street end. On one occasion a driver, after yoking a pony and loading a van in this yard, opened the pend gate, and then went 3 or 4 yards behind the pony and van to get his coat. While he was doing so the pony ran off through the pend into the street. The driver ran after it, but was unable to reach the pony's head on account of the narrowness of the pend. The pony and van collided with another horse and cart, and seriously injured the horse.

In an action for damages raised by the injured horse's owner against the

employer of the driver, it was proved that the practice in the yard was, immediately after the horses were yoked and the vans loaded, for some-one other than the driver to open the pend gate, or for the driver himself to do so immediately before leading out the horse. The pony in question was proved to be a quiet animal, but had been only four days in the defender's possession.

Held (*dub.* Lord Trayner) that fault was proved as against the driver, and that the defender was liable in damages.

Peter Nimmo, confectioner, Glasgow, was the proprietor of an enclosed and private yard in Eaglesham Street, Glasgow. This yard was situated at the back of a tenement of houses in Eaglesham Street, and communicated with that street by a covered pend 8½ feet to 10 feet wide and 40 yards long, with a gate at the street end. This gate was kept closed. Nimmo's vans were loaded and the horses yoked in this yard, and it was the practice after this had been done either for some-one other than the driver to open the gate, or for the driver himself to do so, and immediately thereafter lead out the horse.

On 3rd February 1897 a pony was yoked and the van loaded in the yard. The pony and van were standing about 30 feet from the entrance to the pend. The pony was a quiet animal without vice, and had been purchased by Nimmo on 30th January. The driver, M'Millan, after yoking the pony and loading the van, with the assistance of Hynes, one of Mr Nimmo's workers, went and opened the pend gate. He then returned and passed behind the pony and cart to get his coat, which was hanging at the end of the workshop door about 3 or 4 yards from the rear of the van. While he was doing so the pony went off at a trot toward the street, quickening its pace as it went through the pend. The driver rushed after it, but was unable to pass the cart in the pend and get to the pony's head as the space was too narrow. After leaving the pend the pony turned into Paisley Road by Eaglesham Street and ran into a horse and van belonging to George Milne & Company, bakers, Glasgow, which were standing at a shop door in Paisley Road. The shaft of the van pierced the off shoulder of the horse and seriously injured it.

Messrs George Milne & Company thereafter raised an action of damages for £40, 2s. against Nimmo on account of the injury received by their horse.

They pleaded—"(1) The pursuers' horse having been injured through the negligence of the defender or his servants, or others for whom he is responsible, the defender is liable to the pursuers in damages in respect of said injuries."

The defender pleaded—"(1) The action is irrelevant. (2) The pursuers' horse not having been injured through the fault or negligence of the defender, or the fault or negligence of anyone for whom he is responsible, the defender is entitled to be assoilzied, with expenses."

After hearing proof the Sheriff Substitute (GUTHRIE) on 13th December 1897 pronounced the following interlocutor:—"Finds that on 3rd February last, while the pursuers' horse and van were standing at a shop door in Paisley Road, Glasgow, the defender's pony and van ran into the horse, the shaft piercing its off shoulder, and seriously injuring it: Finds that the defender's pony had been yoked in the defender's yard, and the van loaded; that the driver opened the door enclosing the pend which leads from the yard into Eaglesham Street, which is about 70 feet distant, and, coming back, went to the workshop, a few yards behind the van, to fetch his coat: Finds that while the driver was just behind the van on his return the pony went off at a trot, quickened its pace as it came to the pend, and turning into Paisley Road by Eaglesham Street ran against the pursuers' horse, as aforesaid: Finds that the pony had been but a few days in the defender's possession, and that it ought not to have been left unattended while the gate at the pend mouth was open; Finds the defender liable in damages, assesses the same at the sum of £26 sterling, for which decerns against the defender in pursuers' favour, with interest as craved.

Note.—"This is a very narrow case. There are many occasions, as has often been remarked, on which a horse may be left unattended for a short space without making the owner liable in the event of its bolting. But each case must be judged upon its own circumstances. Here there was perhaps the minimum of negligence, if the evidence of the witnesses, who are all in the defender's employment, be taken as perfectly accurate. It seems that on previous occasions the gate was usually, if not always, opened by another other than the driver, but if it was opened by him, he had always been ready to start at once, so that after opening the gate he was always between the pony and the gate. On the day of the accident he had forgotten his coat, and had to pass the standing pony and go some yards further to get at it. The witness Hynes was close behind the van, and it would have been prudent to ask him to go to the pony's head while he was absent. This he did not do, and the pony moved on, as I suppose he had been accustomed to do on the previous occasions when it had left the defender's court-yard, and not finding the usual hand on the reins had soon run off. I cannot hold the defender's driver in fault for not overtaking and getting hold of the reins, although I think that might have been done by an active and clever lad, but I think the caution of a man of ordinary prudence would have sent Hynes to the pony's head as soon as the road to the street was unguarded. I think so because the pony, though a docile animal, was still imperfectly known to the defender's people, and because the place was still new to it. Thus, as I said before, the case is a difficult and narrow one."

The defender appealed to the Sheriff (BERRY), who on 6th April 1898 adhered to the interlocutor appealed against.

Note.—"The decisions show that the question of fault or no fault in cases like the present is one that is apt to present itself in different lights to different judges. If there is fault in this case it is certainly of the minutest kind, and I have doubted much whether I ought not to hold that no fault has been established. Still to some minds it may seem that there was a semblance of fault in the driver opening, and leaving open, the pend door with the pony harnessed ready to start out of the pend with no-one at its head, while he went back to the workshop to fetch his coat. In that possible view of the case I think, although with much hesitation, that I should not interfere with the Sheriff-Substitute's judgment. The open pend door may be regarded as having offered an invitation to the pony to start off as it did; and in allowing that invitation to be presented to it I am not sure that there was not a certain amount of negligence."

The defender appealed, and argued—There were no circumstances here disclosing fault. The character of the horse was good. Could it be said that negligence had been proved because the carter went behind the cart for a short distance? The case came within the principle laid down in *Shaw* v. *Croall & Sons*, July 1, 1885, 12 R. 1186, in which case the cabman went 10 feet away from his horse and was yet found not to have committed an act of negligence. The case of *M'Ewen* v. *Cuthill*, November 16, 1897, 25 R. 57, was distinguished from the present, because in that case the horse was a few yards from a railway line, and the driver went out of sight of his horse and went into a back shop. The present case was also ruled by *Smith* v. *John Wallace & Co.*, March 11, 1898, 35 S.L.R. 583.

Argued for pursuers—There were two acts of negligence on the part of the driver proved—(1) Opening the gate before being ready to start, and (2) going so far behind the van that if the pony started off he was unable to get to its head. The gate was always kept shut except when the vans were going in or out, so that opening the gate was almost an invitation to the pony to start off. The pony did not bolt at once, it started off slowly, so that it could have been easily stopped if the driver had been within range. The ordinary and usual precautions had been neglected, and the defender was responsible for the damage caused thereby.

LORD JUSTICE-CLERK—In this case it is proved that on the occasion in question the defender's servant, after putting the pony in the cart, opened the pend gate, which was ordinarily closed, and went behind the cart to obtain and put on his coat. The pend was a narrow one, so that while the cart was passing through it, it was impossible for anyone to get past the cart so as to reach the horse's head. The evidence also shows that on all former occasions the gate was opened immediately before the pony was driven out of the yard, and while the driver had it under full control.

Now, the decision in cases of this kind must depend upon circumstances, because it was recognised that a driver cannot always be at his horse's head. A driver may in certain cases go a little distance from his horse, and if an accident happens it cannot be attributed to him. It is recognised, for instance, that a man may take something off his cart and leave it at a shop door, because in such circumstances he remains in sight of his horse and near enough to get to its head if it starts away. Unless this were accepted, it would be practically necessary to have a person with every vehicle. On the other hand there are circumstances which may be held to amount to fault on the part of a driver who places himself in such a position that he cannot readily get at his horse's head. Thus there was a case recently in which we held that a carter was at fault in leaving his horse and going through a shop into back premises from which it was impossible for him to exercise control over his horse or to get to its head promptly.

There is no doubt that the present case is a narrow one. But both the Sheriffs have held that the defenders are liable. I am inclined to think that they are right. Even if there was no person there besides the driver to open the gate, there was no necessity for the driver to open the gate until he had put on his coat and was ready to start. He would then have been in front of the horse. Considering these facts, and the circumstance that if the horse started off it was impossible for the driver to reach the horse and restrain him because of the narrowness of the pend, I think fault has been proved, and that the Sheriffs' judgment is right.

LORD YOUNG—I am of opinion that the pursuers must retain the judgment, and I have reached this conclusion without any of the doubts and difficulties mentioned by the Sheriffs. I should have thought this a very clear case. There was no fault here on the part of the person in charge of the horse which was injured. A horse was the physical sufferer in this case, but it might have been a man, and the case must be taken on the same footing as if a man had been injured. There being no fault on the part of the sufferer, it follows that if there was no fault on the part of the defenders' servant, there was no fault anywhere; this was an unavoidable accident. But it is a proposition which I cannot favour in any way that when a gate between a stable-yard and a public street is left open, and a horse bolts out and runs down a passer-by, that is an unavoidable accident. Such an accident is by no means unavoidable. There may be no great blame—nothing which can be characterised in strong language or can be called crime. I do not mean to say that if a man leaves a gate in a stable-yard open, so that a horse bolts out and kills somebody in the street, that may not be a gross case of negligence, and that if a death is occasioned by reason of it he may be responsible criminally. But without going into the criminal law at all, I think that this accident might and ought

to have been avoided, and that in that sense there is blame. I think at all events that the defender's servant did a rash thing and exposed the public to unnecessary risk when he opened the gate before he got his coat, and then went behind the cart to get it, thus leaving the horse free to run off to the danger of the public. To say that he did this not at his own risk or that of his master, but at the risk of third parties passing along the street, is a view which I cannot assent to. I am prepared to state as distinctly as I can that if a horse rushes out of a stable-yard into the street on account of the gate being left open by the owner's servant, the risk is with the servant or the owner and not with the innocent third party.

I go much further than your Lordship has done in your opinion. I am of opinion that if a carter leaves his cart to deliver a parcel at a shop door, and his horse runs away and knocks down some-one in the street, the risk is with him and his master and not with the innocent person on the street. Many things may be done or left undone by owners of carts and horses to avoid expense, but if risk is caused by their acts or omissions, I am prepared to say that the responsibility should attach to the person who causes the risk.

I do not, however, need to put the case beyond this point, that the gate between the yard was incautiously left open by the defender's servant, and that he is liable for the damage caused by this having been done.

LORD TRAYNER—I must say, though I have no clear opinion in this case, I am quite unable to concur with the views that have fallen from Lord Young. I think the case is an extremely narrow one—indeed, the dividing line between fault on the one side and accident on the other is so extremely narrow that I am not confident that I can see it at all. I find it difficult to distinguish this case in any material respect from the case of *Shaw* v. *Croall*, and if I followed the inclination of my own mind I would have been disposed to follow the course taken in that case of assoilzieing the defenders on the ground that no actionable fault on their part or on the part of their servant had been established. But as your Lordships are of opinion that the exceptionable circumstances alluded to by your Lordship in the chair may afford a distinction between this case and that of *Shaw*, and as the Sheriffs have arrived at a similar conclusion, I am not prepared to dissent from the judgment proposed.

LORD MONCREIFF—This is undoubtedly a very narrow case, certainly narrower than *M'Ewan* v. *Cuthill*, 25 R. 57; but I am not prepared to differ from the well-considered judgment of the Sheriff-Substitute. In order to fix liability for such an accident there must be proof of negligence on the part of those in charge of the horse. There are many occasions when a driver is obliged to leave his horse's head when the mere fact of his doing so will not infer negligence. The case of *Shaw*, in 12 R. 1186, is an example.

The negligence which I think is proved here consists in this. The covered pend is about 40 yards long, and only wide enough to permit the passage of a van or cart. If the gate in the pend is left open and a horse runs off out of the yard into the pend towards the street, it is admittedly impossible for anyone to run alongside the cart in the pend and so reach the horse's head. It is therefore a matter of danger to open the gate before the driver has his horse in hand unless someone else is standing at the horse's head. The defender himself very candidly says—"As a rule the driver gets on to his seat and another person assists in leading the horse and another one opens the gate and shuts it. The driver would get on to the box and go through the pend and right out to the street. That is the usual way." Although the driver M'Millan denies it, the witnesses George Milne and Andrew M'Neilage say that M'Millan admitted in their hearing that such was his usual practice.

Now, on this occasion M'Millan, after opening the gate, went back to the workshop for his coat, leaving no one at the pony's head; the pony moved on, and before he could catch it was galloping through the pend. M'Millan says that when the pony started he was just at the back of the van, and Peter Hynes corroborates him. I rather doubt the accuracy of the statement, because the pony had 30 feet to run before entering the pend, and at first was not going fast, and therefore if M'Millan was so close to it when it set off, one would have thought that he could have got to the pony's head before it entered the pend. Be this as it may, I think that M'Millan was negligent in opening the gate and leaving the pony untended, and damage having resulted, the defenders are liable for M'Millan's fault, slight as it was.

The Court pronounced the following interlocutor:—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor of 13th December 1897: Therefore of new decern against the defender for payment to the pursuers of the sum of £26 sterling, with interest thereon at £5 per centum from the date of citation."

Counsel for the Pursuer—Jameson, Q.C. —M'Clure. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders—Salvesen—John Wilson. Agents — Macpherson & Mackay, S.S.C.