and were at the same time compelled to decide the question to which I have just adverted, I should, I think, have to sustain in this case where he has taken possession and worked off the waygoing crop the applicant's claim to compensation under the statute. But I desire to hold myself free on the merits of the question here raised, for I think it a most dangerous thing to decide summarily such a large and far-reaching question on a case the course of which has been such as not properly and fully to raise it or to present it in all its bearings. This presses the more upon me that I feel your Lordships' judgment may go further than I think you probably intend it to do, for it will doubtless some day be pleaded (first) as a bar to removal for non-residence however absolute and continuous, and (second) as converting the claim of compensation into a right of succession which vests *ipso jure* in the heir or legatee at whatever distance he may reside, and though he has not the slightest intention of coming to enter on possession of the holding. I think that we ought not without necessity to throw difficulties in the way of obtaining an untrammelled judgment on this aspect of the question, which will doubtless some day arise, and which we have not had under cognisance. A judgment on such narrow and unsatisfactory premises may well foreclose the wider issue and defeat the intention of the Legislature.

LORD PRESIDENT—I have had an opportunity of reading the opinion delivered by Lord Skerrington and concur in it *in omnibus*, and therefore the question will be answered as his Lordship suggests.

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

Counsel for the Appellant—Morton—Lillie. Agents—Pairman & Miller, S.S.C.

Counsel for the Respondent—Blackburn, K.C.—Maconochie. Agents—J. C. & A. Steuart, W.S.

Wednesday, February 28.

EXTRA DIVISION.

[Sheriff Court at Lerwick.

UMPHRAY *v.* GANSON BROTHERS.

Reparation—Negligence—Road—Motor Car Overtaking Led Horse—Motor Cars (Use and Construction) (Scotland) Order 1904, Article IV (3).

A horse, led by bridle and rope held by a man walking on the left side of the road and of the horse, collided in daylight with a motor car which about 15 yards from overtaking the horse had been thrown out of gear to avoid noise, had been drawn somewhat toward the right side of the roadway, but had not materially reduced speed. The roadway was about 12½ ft., the car 5 ft. 7 in., in width, and between 5 and 6 ft. of the width of the roadway were left for the man and horse. When overtaken by the car, which was travelling at 18 miles an hour, on a down gradient, the horse swerved to the right, collided with the car, and was injured.

Held that the driver of the car was blameworthy and his master liable in damages, in respect that the injury to the horse resulted from the driver's failure to apply the brake and give the horse a wider berth than he did.

Opinions reserved on the question whether, in view of the Motor Cars (Use and Construction) (Scotland) Order 1904, Article IV (3), the man in charge of the horse could have taken it to the off-side of the road and place himself between the horse and the car.

The Motor Cars (Use and Construction) (Scotland) Order 1904, which is dated March 30, 1904, Article IV, enacts—"Every person driving or in charge of a motor car when used on any highway shall comply with the regulations hereinafter set forth, namely—. . . 3. He shall when meeting any carriage, horse, or cattle keep the motor car on the left or near side of the road, and when passing any carriage, horse, or cattle proceeding in the same direction keep the motor car on the right or left side of the same. . . . 6. He shall on the request of any police constable in uniform, or of any person having charge of a horse or cattle, or if any such constable or person shall put up his hand as a signal for that purpose, cause the motor car to stop and to remain stationary so long as may be reasonably necessary."

William Hay Umphray, farmer, Reawick, *pursuer*, brought an action in the Sheriff Court at Lerwick against Ganson Brothers, motor-car hirers, &c., Lerwick, *defenders*, concluding for payment of £45 in name of damage sustained by the pursuer in consequence of the loss of a horse through the fault of the defenders' employee.

The pursuer averred—"(Cond. 3) On Thursday 20th August 1914 a horse belonging to the pursuer was travelling by road from Reawick to Lerwick for the purpose of being shipped from Lerwick to Aberdeen for sale. The horse was in charge of Alexander Stout, the pursuer's ploughman. (Cond. 4) At a point in the public road between Bixter and Tresta, nearly opposite the house called Quarsdale, the said Alexander Stout and the pursuer's horse in his charge were overtaken by a motor car belonging to the defenders, which was being driven from Walls to Lerwick by a chauffeur in the employment of the defenders, and for whom they are responsible. (Cond. 5) At the time when the motor car overtook the horse, the horse was being carefully led by the man in charge, who, in due compliance with the rules of the road, kept as close to the left or near edge of the road as it was possible to go. (Cond. 6) At the place referred to the road does not exceed 12 feet 9 inches in breadth from ditch to ditch. (Cond. 7) In view of the narrowness of the road and the greater risk thereby arising of a possible accident when the motor car was

passing the led horse it was the duty of the chauffeur in charge of the motor car when about to overtake the led horse to slow down the speed of the car and to take special care to guard against any accident. It was also his duty to steer the car to the right or off-side of the road so as to leave sufficient space between the left or near side of the road and the car to allow of the man and the horse he had in charge being passed safely. There was no other traffic on that part of the road at the time. (Cond. 8) The defenders' chauffeur failed to perform these duties incumbent on him. He did not slow down the speed of the car, but continued travelling at a high rate of speed, and instead of steering the car to the right side of the road he kept travelling almost in the middle of the road, leaving quite insufficient space between the car and the ditch on the left side of the road to allow of the horse and man being passed safely, whereas there was a space of nearly 3 feet between the car and the ditch on the right side of the road. (Cond. 9) The defenders' motor car struck the pursuer's horse on its right hind leg and broke that leg below the hock. In consequence of this injury it was found necessary to shoot the horse. This accident was solely due to the fault of the defenders' chauffeur in not steering the motor car sufficiently to the right side of the road so as to allow sufficient room for the horse and man when the car was passing them, and in not taking due care to avoid an accident by slowing down the speed of the car when about to pass them."

In answer the defenders admitted the averments in Conds. 3 and 4, and that there was no other traffic on the road at the time. They stated that the chauffeur complied with the rules of the road, sounded his horn, and slowed down as he approached the horse. *Quoad ultra* they denied the pursuer's averments above set forth.

They also averred in a statement of facts —"(Stat. 1) It is believed and averred that the horse was restive and not under proper control. (Stat. 2) No request was made by the man in charge for the car to be stopped. (Stat. 3) The collision was caused by the fault of the man in charge of the horse or his neglect to control it."

The pursuer admitted the second of these statements and denied the first and third.

The pursuer pleaded, *inter alia*—"The pursuer's horse having been injured by the defenders' motor car through the fault of the defenders' servant, for whom they are responsible, the pursuer is entitled to reparation from the defenders."

The defenders pleaded, *inter alia*—"2. In any event the pursuer by his negligence having caused or materially contributed to the injury complained of, the defenders are not liable to reparation therefor."

On 23rd July 1915 proof was led before the Sheriff-Substitute (MENZIES), who on 22nd December 1915 issued the following interlocutor—"*Finds in fact* that (1) a horse belonging to the pursuer was on 20th August 1914, during broad daylight, being led by the pursuer's servant on the road from Reawick to Lerwick, to be shipped from there for sale in Aberdeen; (2) the horse was being led on its left-hand side of the road by a bridle and rope held by the pursuer's servant on the left-hand side of the horse; (3) while being so led at a point where the road is about 12½ feet wide, with a shallow ditch on either side and a slight declivity in the direction being taken, the horse was approached from the rear by a motor car 5 feet 7 inches wide, driven by a servant of the defenders and travelling at about 18 miles an hour; (4) the pursuer's servant was aware of the oncoming of the car, but made no sign to the driver as to his conduct in passing the horse; (5) the driver, before overtaking the horse, threw his car out of gear to avoid noise in passing, materially slackened his pace, and drew to the right-hand side of the road, leaving the man and horse between 5 and 6 feet of the roadway—approximately half its width; (6) at the moment when the car overtook the horse, which had been going quietly, it unexpectedly slewed towards the middle of the road and collided with the car, the left front wheel of the car passing in between the hind legs of the horse; (7) the collision partly turned the steering wheels of the car towards the left-hand side of the road, and the horse and car together passed obliquely over the left-hand ditch bordering the road, at a point about 7 feet ahead of the spot where the collision took place; (8) the canon bone of the right hind leg of the horse was broken as the direct result of the collision, necessitating the immediate destruction of the horse: *Finds in law* that the pursuer has failed to prove that the collision took place through the fault of the defenders' servant: Therefore assoilzies the defenders from the crave of the writ."

The pursuer appealed to the Sheriff (M'LENNAN). A reclaiming petition and answers were lodged. On 4th April 1916 the Sheriff pronounced the following judgment—"Recals the said interlocutor: Of new *finds in fact* in terms of the first four findings in said interlocutor: Further finds in fact (5) that the driver of the motor car, when about 15 yards from overtaking the horse, threw his car out of gear to avoid noise in passing, and let the car run by gravitation, but that the road at the place in question being on a down-gradient of 1 in 20 the speed of the car was not materially reduced; (6) that the driver did not draw the car sufficiently to the right-hand side of the road to provide for any natural movement of the horse towards that side while the car was in the act of passing the horse, although there was sufficient room to have enabled him to do so; (7) that at the moment when the car overtook the horse, which had been going quietly, the horse without altering its forward direction swerved somewhat to the right, and that owing to the small margin left by the driver between the horse and the left side of the car, the result of the horse's swerving was that it collided with the car, and the left front wheel of the car passed in between the hind legs of the horse; (8) that the canon bone of the right hind leg of the horse was broken as the direct result of collision with the car; (9)

that the horse's hind legs partly turned the front wheels of the car towards the left-hand side of the road, and that the horse and car together passed obliquely over the ditch bordering the road on the left side at a point a short distance ahead of the spot where the collision took place; (10) that in consequence of the injury sustained the horse required to be immediately destroyed; (11) that the defenders' said driver was guilty of negligence in failing to draw his car sufficiently to the right or off-side of the road to enable him to pass the pursuer's horse in safety, and that the accident was the result of said negligence: Therefore *finds in law* that the defenders are liable in damages to the pursuer; Assesses the damages at £40 sterling; Ordains the defenders to make payment of the said sum of £40 to the pursuer, and decerns."

Having procured a certificate that the cause was suitable for appeal to the Court of Session, the defenders appealed, and argued—The driver was not bound to anticipate that the horse would shy. Had he merely reduced speed without letting the car run silently, he would have incurred the risk of the noise frightening the horse and causing an accident. On the evidence the pursuer had failed to prove that had the driver afforded further space for the horse the accident would not have happened. The cases of *Wordsworth* v. *Willan*, 1805, 5 Esp. 273, and *Mayhew* v. *Boyce*, 1816, 1 Starkie 423, differed from the present. In *Wordsworth's* case the driver had done nothing to give room; in *Mayhew's* a safe and an unsafe course being open to the driver he negligently chose the latter. It must now be taken that in any event contributory negligence was here sufficiently averred to admit of proof—*Simpson* v. *Stewart*, 1875, 2 R. 673. Evidence upon it had been led without objection and accordingly regard must be had to the plea—*Ritchie & Son* v. *Barton*, 1883, 10 R. 813, 20 S.L.R. 530; *Kerr's Trustees* v. *Kerr*, 1883, 11 R. 108, 21 S.L.R. 89. In not keeping between horse and car, the pursuer's servant was negligent; it was his duty to do his best to avert accident. The Motor Cars Use and Construction (Scotland) Order 1904, Article IV (3), founded on by pursuer laid down no exhaustive rule, nor had it any bearing on the present case.

Argued for the pursuer (respondent)—The accident was due to the negligence of the defenders' chauffeur in failing in his duties to reduce speed and keep as far as he could from the horse. There was no contributory negligence on the part of the pursuer's servant, nor any averment to support the plea of contributory negligence. It not being averred that he was on the wrong side of the road, evidence to that effect was incompetent and must be disregarded—*Thiem's Trustees* v. *Collie*, 1899, 1 F. 764, 36 S.L.R. 557. Not only had he complied with the statutory Order (*cit.*), but he had kept as near the side of the road as he reasonably could. He was guilty of no negligent omission—Beven, Negligence, p. 541; *Jardine* v. *Stonefield Laundry Company*, 1887, 14 R. 1839, 24 S.L.R. 599.

At advising—

LORD DUNDAS—This is a somewhat narrow case, and the learned judges in the Court below have differed in opinion. I think that the conclusion arrived at by the Sheriff is right, and that the appeal must fail.

I have no hesitation in saying that in my opinion it is the duty of the driver of a motor car, when overtaking and desiring to pass a led horse upon a narrow road such as we have here—between 12 and 13 feet in width—to give the animal as wide a berth as is compatible with due regard to the safety of the car, and to exercise all reasonable care and caution in manœuvring it while passing the horse. This duty I think the driver of the defenders' car failed to discharge. It would be difficult, perhaps impossible, to determine to a matter of feet and inches the exact position in relation to the roadway of the car and of the horse respectively at and immediately prior to the accident. But having heard the arguments and having read the evidence with care I think it is established that the driver could, with perfect safety to his car, have given the horse a wider berth than he did to a considerable extent—I estimate it at about 2 feet—and that in failing to do so he failed to discharge his legal duty and was in fault. I am further of opinion that in passing the animal as he did at a speed of about 18 miles an hour on a downward gradient of about 1 in 20, and without using his brake, the driver, who admits that "he is not acquainted with horses," was guilty of negligence. It may be that it is not possible to affirm with certainty that an accident would necessarily have been avoided if the driver had discharged his duty, but if he had done so and an accident had happened it would have been of a different character from that which in fact occurred, and the question as to the driver's liability might well have been different. On the facts before us I am satisfied that the car driver was to blame for the injury to the pursuer's horse, which was being led by the man Stout in a careful manner and close to the side of the road. It is true that Stout when he heard the motor horn did not call upon the driver to stop the car, but that fact cannot, in my judgment, be construed as an implied invitation to the driver to advance and to pass on the course and in the manner he elected to pursue.

The proof contains some evidence to the effect that it was Stout's duty to take his horse over to the offside of the road and to place himself between the animal and the overtaking car. As to this evidence, and as to its bearing in relation to section 4 (3) of the Order of 1904, I desire to express no opinion. The point is not raised upon the record, and no question in regard to it was put to Stout when he was in the witness-box. We are not therefore, in my opinion, entitled to consider the evidence to which I have referred, or to give any effect to it in deciding the case.

I am for refusing the appeal and affirming the Sheriff's interlocutor, but with a variation in the terms of his eleventh finding.

LORD MACKENZIE—The pursuer seeks to make the defenders liable for damages in respect of injuries caused to a horse belonging to him by one of their motor cars.

The fault alleged against the driver of the car, a servant of the defenders, is that he passed the horse, which was being led along a narrow road, at too great speed and without allowing enough room. If this case is made out, then there was breach of the duty incumbent on the chaffeur, which was to use all reasonable care in passing the horse. The degree of care necessary will, of course, vary according to circumstances. In the case of a led horse on a narrow road there is a duty upon the driver of an overtaking motor car to have his car well under control and to give the horse all the room available. These precautions are necessary, because it is impossible for a man leading a horse to have complete control over its movements. There is always the chance of its swerving when a car comes up behind it. If the car is slowed down the risk of accident or of injury from accident is minimised. If an accident happened it would be because the horse backed into or kicked the car, not because the car ran into the horse. I make these observations because it appears to me that neither the Sheriff-Substitute who decided against the pursuer, nor the Sheriff who decided in his favour, attach the weight I am disposed to give to the pace at which the car was going. The evidence of Anderson, the chauffeur, is that his car was running 18 miles an hour, and that when 15 yards from the horse he pulled the car out of gear. It is proved that the gradient was 1 in 20, and as there is no evidence that the brake was applied the result would be that the speed of the car would not be appreciably diminished. He was in fault in my opinion in not putting on his brake to slow down the car if, as he endeavoured to do, he was to pass the horse with his clutch out. He had the alternative of putting the car on to a low gear and thus going past the horse slowly. He states that the objection to this is that the increased noise would have frightened the animal. The answer to this is that if he had crept past the horse on the low gear the risk of accident from his running into the horse would have been obviated.

I am unable to accept the evidence led for the defenders as to how the accident happened. My view is that the horse swerved slightly—"The horse turned a very little in my hands"—and was struck by the car. He was being walked along the near or left-hand side of the road, Stout having him short by the head, leading him by a bridle with rope attached. His off hind leg was caught by the front of the car, which was travelling on the right or off-side of the road. This entangled the steering gear, and the car ran transversely across the road for a short distance into the ditch on the left side. The question is, Did the driver of the car allow the horse the amount of room proper in the circumstances? I agree with the Sheriff that he did not. According to the measurements proved I estimate the situation to have been as follows:—The width of the road is about 12 feet 9 inches; the width of the car, including the hood, is 6½ feet, but the breadth inside the wheels is only 4 feet 7 inches. If the off-wheel had been close to the ditch on the off-side, then the car would have occupied about 6 feet of the road (a certain width overhanging the ditch). This deducted from 12 feet 9 inches would give 6 feet 9 inches of clear space on the near side of the road. Stout says he had 4 to 5 feet, so that there was about another 2 feet which the car driver could have given him. The fact is that Anderson did not keep as close to the ditch on the off-side as was reasonably possible in the circumstances, and came on with practically unslackened speed. Stout says there was nothing to prevent Anderson keeping further to the right side. Anderson does not say he could not have gone nearer the ditch. My opinion is that the driver having failed to a substantial extent to give the horse the room that was available this constituted fault on his part. I therefore agree that the Sheriff's judgment should be affirmed. This is sufficient for judgment, and what I am about to say has not affected my mind in coming to a conclusion on the case. I decide the case on the footing that Anderson saw Stout on the near side of the road, and that he was entitled to pass him on the off-side.

I feel, however, that I cannot leave the case without adverting to a matter which is of considerable public interest. It is not properly before the Court, for there is no word of it on record, and no question was put to the pursuer's leading witness in cross-examination on the point. There is, however, evidence about it. I refer to the respective duties of a man leading a horse on a narrow country road and of the driver of a motor car overtaking him. On this occasion the man was walking on the near or left side of the road; the overtaking car kept the off or right side of the road. This was in accordance with Article IV (3), 1914 Order. The question for future consideration in a case when it is properly raised is whether this rule should be considered exhaustive. There is in the present case evidence which shows that the proper course is for a man leading a horse on a narrow country road to keep himself between the car and the animal. It is the fact that a man leading a horse cannot control the movement of the animal's quarters. The horse is held by the head and cannot be prevented from swerving. When he swerves the tendency is to swerve out from the man leading, and if the horse is being led on the near side of the road this means that he swerves in the direction of the oncoming car. There is evidence to the effect that the safe course is for the driver of the car to sound his horn and slow down so as to give the man in front who is leading the horse time to get across to the off or right side of the road. If the driver does this then the man with the led horse bears across the road to the off or right side of the road. When the car passes it does so on the near or left side. The man is between the car and the animal and the horse thus cannot get at the car with his heels. Several witnesses say that

the course indicated is in accordance with practice.

It is evident that so long as the Article IV (3) remains unqualified it would require a clear averment of custom and proof of the practice before a court of law could take judicial cognisance of it. I am bound, however, to say that I think what I have described above is the safe course to take, and that it is in accordance with the practice in country districts. If it had been followed in the present case there would have been no accident of the kind which happened.

LORD CULLEN—I am of opinion that the conclusion arrived at by the Sheriff is right.

When the defenders' motor car made up on the led horse the driver of the car saw that Stout, the man leading the horse, was not on the outer side of it next to the course of the car, but on the inner side, so that the risk arising from the possibility of the horse swerving when the car came up was all the more serious. The driver of the car might have acted in different ways to promote a safe passing of the horse. As it was, he accepted the situation and drove on past the horse without stopping or slowing his car.

Now as the risk of the horse swerving on the approach of the motor car was an obvious and serious risk, I think that ordinary prudence dictated at least that the driver of the car should give the horse as wide a berth as he could give it, consistently with safe driving of the car. The safety of the car called for this as well as the safety of the horse. But in this respect I think that the driver failed in his duty of carefulness. The road was a narrow one. It is difficult to arrive at precise measurements for fixing the course of the car. But on a consideration of the evidence I am satisfied that there was from 1½ to 2 feet of roadway on the right-hand side of the course of the car which the driver did not utilise, and which he might and ought to have utilised, as a matter of reasonable care in order to conduce to a safer passing of the horse.

I further think that the driver of the motor car was in fault in driving past the led horse as fast as he did. He perilled everything on a quick dash past. This meant that if the horse should suddenly swerve he had deprived himself of the chance of averting a collision which slow and cautious going, with his car thereby under better control, would have offered to him.

I desire to express no opinion on the "rule of the road" applicable to led horses, whatever it may be, as affected by Article IV (3) of the Motor Car Use and Construction (Scotland) Order 1904, because I do not think the topic is raised for judgment. The point in this connection sought to be taken by the defenders is not raised in their averments and pleas. Nor was it put in the course of the proof to Stout, the leader of the horse, whom the defenders would seek to convict of contributory negligence.

The Court refused the appeal and granted decree for payment of £40 in full of the sum sued for, and made the following findings:—"Find in fact in terms of the findings in fact and in law contained in the interlocutor of the Sheriff, dated 4th April 1916, with the variation that the eleventh finding therein be deleted and the following finding be inserted in place thereof, *videlicet* (11) that the defender's said driver was guilty of negligence in failing to draw his car across the road away from the horse, as was reasonably practicable, and in passing the animal at a speed of about 18 miles an hour in a down-gradient of about 1 in 20, and without slowing down, and that the accident was the result of his negligence: Affirm said interlocutor as varied." . . . . .

Counsel for Pursuer and Respondent—Christie, K.C.—Morton. Agents—Mackenzie & Kermack, W.S.

Counsel for Defenders and Appellants—M. P. Fraser—A. M. Mackay. Agents—Manson & Turner Macfarlane, W.S.

Tuesday, November 21.

SECOND DIVISION.

SURMA VALLEY SAW MILLS, LIMITED, PETITIONERS.

Company — Winding-up — Transfer of Shares—Winding-up by Court—Application for Authority to Register Transfer of Shares after Commencement of Winding-up.

A company, in which there had been friction as to the conduct of the business, having presented a petition for a judicial winding-up, a note was presented on behalf of the company and a shareholder setting forth that since the resolution for winding-up the friction had been brought to an end by the two shareholders who had caused it having sold their shares to the shareholder concurring in the note, and asking authority to register the transfers of the shares in the register of shareholders, with the consent of the liquidator. The Court when *appointing* the liquidator also *authorised* the registration of the transfers.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 139—"*Commencement of Winding-up by Court*—A winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding-up." Section 205—"*Avoidance of Transfers, &c., after Commencement of Winding-up*—. . . (2) In the case of a winding-up by . . . the court, every disposition of the property (including things in action) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding-up, shall, unless the court otherwise orders, be void."

The Surma Valley Saw Mills, Limited, *petitioners*, on 7th November 1916 presented