By the 23rd section of the statute it is enacted that nothing therein contained shall extend to prevent any employer making or contracting to make any stoppage or deduction from the wages of any artificer, workman, or labourer employed in any of the enumerated occupations.

My opinion is, that in order to be within that section, and so saved from the operation of the statute, the rent referred to in the contract must be rent due by a person "employed."

The payment in respect of which the deduction referred to in this case was to be made was not rent due by a person employed, but a sum alleged to be due in name of rent by a person who had ceased to be employed as such artificer or workman, and in respect of his having thereby become bound to remove or pay that amount.

I think that such a contract is not saved by clause 23 from the operation of the statute.

Lord Justice-Clerk—I concur in the opinion of Lord Rutherfurd Clark in its entirety. I think it is plain that the object of the form of regulations adopted at this colliery was if possible to bring this practical arrangement for a charge of 1s. per day within sec. 23 as being "rent." With that view article 4 of the regulations was framed. I think it is plain that the sum is not rent in the sense of sec. 23, but is a deduction intended to cover a sum for the retaining of his house by the miner when he has no right to it as a tenant, he having ceased to be in the employment, and therefore having no right to remain. But sec. 23 only refers to an arrangement under which, as part of the contract, the employer provides a house for the workman, and becomes entitled to deduct rent which has become due at the date of the deduction, and nothing more. It does not empower the employer to deduct for future occupation of a house, whether by agreement for lease or otherwise. The consent in the receipt given by the workman in this case, that the employer shall deduct from his wages his "house rent," is a perfectly competent contract under sec. 23. It is nothing more than an arrangement that the house rent which has become due shall be kept by the master at settling time. It means no more. If it did mean more—if it meant a consent to deduction as specified in article 4 of the regulations—it would not fall under sec. 23, and would be illegal under sec. 2. I therefore think that the first two questions should be answered in the affirmative, and the third in the negative.

The Court found that article 4 of the regulations and its proposed enforcement by the respondent were prohibited by the 2nd section of the statute, and were not within the exceptions recognised by the 23rd section.

Counsel for the Appellant—D.-F. Mackintosh—Wallace. Agent—James Auldjo Jamieson, W.S.

Counsel for the Respondent—J. A. Reid—Shaw. Agents—Wallace & Begg, W.S.

COURT OF SESSION.

Friday, December 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

STRANG *v.* BAIN.

Horse—Loan—Injury while in Borrower's Custody—Reparation—Onus—*Discharge of* Onus.

When an article is lent in good condition and is returned damaged, the *onus* is on the borrower to show (1) that all due care was taken of the article, and (2) that it was not used for any other purpose than that for which it was lent.

While the borrower of a horse was driving it along a road the horse fell, and sustained severe injuries. In an action by the owner against the borrower it was proved that the road where the accident occurred was level and free from stones; that at the time of the accident the defender had been driving at a moderate pace and with tight reins; that the horse had general weakness of the fore parts, and that he had also at various times suffered from the effects of bad shoeing. *Held* that the defender had observed reasonable care in using the horse, and that the accident was not caused by his fault, and the defender therefore *assoilzied.*

William Bain, Wharrie House, Hamilton, raised an action in the Sheriff Court of Lanarkshire at Hamilton against Robert Strang, Strathmore, Hamilton, concluding for payment of £35, 18s. 3d., the value of a cob lent by the pursuer to the defender, and which the pursuer averred had been injured through the recklessness or negligence of the defender. In the proof allowed by the Sheriff-Substitute the following facts were established—On 3rd June the defender got the loan of the pursuer's horse to drive himself and his friend, a Mr Begg, to Blackwood, about nine miles from Hamilton. With the pursuer's consent the horse was yoked to a two-wheeled cart, although before that time it had been driven by the pursuer in a four-wheeled dog-cart. The horse performed the journey to Blackwood in safety, but when returning in the evening he fell and seriously injured his knees.

The account of the accident as given by the defender is as follows:—"The horse was in good condition when we got it, as far as I know, and went quietly to Blackwood. We drove direct to Blackwood from Hamilton. We stabled at the farmhouse, and started to return about seven minutes past nine in the evening. It was in the beginning of June. It was not dark. The horse came down about a hundred or a hundred and fifty yards on the Hamilton side of Avon Bridge. That would be about a quarter-past ten. I cannot say the distance between Blackwood and Hamilton. I think it must be about nine miles. Avon Bridge is just at the entrance to Hamilton. I was driving when the horse fell. I was driving carefully. Mr Begg and I were alone in the machine. We were both pitched out. The machine was damaged, and so was the

horse. It was a dog-cart. I should say we were driving six or seven miles an hour when the horse fell. I was not driving with a loose rein. The horse had leather padding on his sole. There was no stone in his foot. When I examined the ground I thought it was a stone that had made him fall. I examined the ground to see if there were loose stones just at the place where the horse fell. I did not see any loose stones. I saw a scar on the road. I saw nothing in the state of the road which would account for the horse coming down. . . . I have been in the habit of driving for twenty-three years, or thereabout, occasionally. As a rule, when I have occasion to hire, I always drive. I have a knowledge of horses in a general way. When the accident happened I was certainly driving as carefully as I could. I was thrown or pulled out of the machine. I had most decidedly a firm hold of the reins when the beast stumbled. I think it was the tumble forward pulling the reins that pulled me out. There was no indication whatever of a stumble before falling. It tumbled forward without the slightest warning."

Begg's evidence corroborated this account. He deponed—"Coming home, when near to Avon Bridge, the horse came down. We were not driving quickly at the time. We were going at what you might call a dog's-trot—a good trot. Mr Strang was driving. He made an examination to see if there was anything on the road which could account for the horse coming down. I think he said he had found a slip, as if the horse had placed his foot on a stone. I do not know that there were any loose stones. There was nothing that I saw in the state of the road to account for the horse coming down. My opinion was that the horse had fallen asleep. I do not think it was going at a trot of six or seven miles an hour. It was not much more than a walk. We were not driving with a loose rein. Mr Strang had a good catch of the horse any time I saw him. The horse was cut on the knees, and bleeding. . . . Before coming to the spot where the accident happened, Mr Strang said, as he did not like to take the horse in heated, he would give it plenty of time and go slowly home. This was immediately after going down the hill, 300 or 400 yards before where the accident happened. There was nothing suggested itself to me at the time as a reason for the horse stumbling. Mr Strang seemed to be driving as carefully as he had been doing all day."

Donald Bain, the pursuer's brother, deponed as follows—"I have also seen it going lame from a shoe being put on too tight. It does come to this, that while my brother had the horse, we had frequently to complain of it going lame. It seemed to be an unfortunate horse in that respect, but there was nothing at all wrong with itself. For a month or two before the accident it was shod with leather pads on its soles. From the fact that it was rather big in the frog of the foot, stones got in, and Mr Copeland, the shoer, advised padding to prevent this. Any time it went lame it was caused by improper shoeing."

The pursuer deponed—"Four or five months after my purchase (of the horse) he was attended by Mr Hamilton, the veterinary surgeon. He was lame. I do not know the cause. He was attended in our own stable. He was three to four weeks lame. I never heard such a thing that the illness was from slipping the shoulder. I do not know what slipping the shoulder is. I am aware there was a dispute as to the lameness. Some said it was in the foot; others said it was in the shoulder. Mr Hamilton said at the time he could not understand where the horse had got lame, but it must have occurred by pulling too hard, or something of that kind. Mr Hamilton operated upon the shoulder."

James B. Hamilton, veterinary surgeon, deponed—"I attended the horse once while with Mr Bain. It was very shortly after Mr Bain purchased it. He was then suffering from a little overexertion. He was a good while in the stable. We found it necessary to blister him, and until the marks of the treatment had gone away I think he was not sent out. That would be about six weeks. We blistered him on the shoulder. It was not a case of slipping the shoulder. Shoulder-slipping is a very different matter. I could not confuse the two. I do not think that ailment depreciated the value of the horse after he got better. It was a sprain on the muscles from too long a journey by a young horse, and I believe the muscles would be as good as ever. I had the horse a fortnight or three weeks before I sold it to Mr Bain."

David Cran, horse-dealer, deponed—"I had seen the horse before, and I thought he had been what we call 'junked' in the fore—that is, the muscles strained. It was not a slipped shoulder. It was just general weakness of the fore parts."

The pursuer pleaded, *inter alia*—"(2) That as the cob had been rendered useless for the pursuer's purposes by the injuries it had sustained through the defender's fault, he was bound to pay the pursuer the damage sustained by him."

The defender pleaded, *inter alia*—"(2) That as the horse had not been injured through the recklessness or negligence of the defender, he was not responsible for any loss which the pursuer had sustained."

The Sheriff-Substitute (BIRNIE) pronounced the following interlocutor:—"Finds that the pursuer's horse was injured while on loan to the defender, and that the defender has not proved he used all reasonable care: Finds in law that the defender is liable in damages, &c.

"*Note.*— . . . The law is that a borrower must take all reasonable care, and prove that he has done this. In *Wilson* v. *Orr*, 1879, 7 R. 266, the Lord Justice-Clerk Moncreiff said—'The hirer of an article under the contract of location is under an obligation to restore the commodity in like good condition as that in which he received it. If the subject of the contract perish without fault on the part of the hirer, it perishes to the owner, and the hirer is sufficiently discharged of his obligation if he have taken reasonable care of it. But if the subject of the contract be not restored in like good condition as that in which it was received, there is a certain burden of proof laid on the hirer. He must show the cause of injury or death, and at least produce *prima facie* proof that the cause was one for which he was not responsible.' And Lord Gifford says the same burden lies on all parties who under any other contract get the entire use, custody, and control of another person's property.

"The point is narrow, as the direct evidence is that the defender was driving carefully, and with a tight rein, and as Mr Begg's surmise that the horse had fallen asleep is inconsistent with his evidence that it was driven at a fair pace until within three hundred or four hundred yards of the spot where it fell, but I cannot hold that the defender has acquitted himself of the burden thrown on him. There is nothing to account for the horse falling. The road was practically level, there was no stone in the neighbourhood, and the horse's feet were soled with leather so that a stone would not so probably cause it to stumble. Nor has the defender attempted to prove that the horse was liable to fall, or that a horse will fall without cause if driven with proper care." . . .

On 24th May 1888 the Sheriff adhered to this interlocutor.

The defender appealed, and argued that the evidence showed that the horse was weak on its fore legs, and so had a tendency to fall; the evidence further showed that the defender had taken all possible care of the horse, and the accident was not caused by carelessness or recklessness on his part. The law was settled in the cases of *Pyper* v. *Thomson*, February 4, 1843, 5 D. 498; *Pullars* v. *Walker*, July 13, 1858, 20 D. 1238; *Wilson* v. *Orr*, November 22, 1879, 7 R. 266.

The respondent argued that the *onus* of showing that all reasonable care had been taken of the horse lay on the defender. He had received the horse in a sound condition and had returned it severely injured; and apart from the account given by himself and his friend of how the accident occurred, there was no evidence to support their story. In these circumstances it could not be said that the defender had discharged the *onus* that lay upon him, and he was accordingly liable in the sum sued for—*Robertson* v. *Ogle*, June 23, 1809, F.C.

At advising—

Lord President—In this case the defender borrowed a horse from the pursuer for the purpose of driving from Hamilton to a place called Blackwood, about nine miles therefrom, and back again. It was argued that the loan of the horse was not entirely a gratuitous matter, as it was thought that a Mr Begg, who was accompanying the defender, might be a possible purchaser, as he was looking out for a horse at the time. I do not think, however, that this suggestion has been in any way established by the evidence, so, in dealing with the case, I shall view the loan as an entirely gratuitous one. But there are certain conditions which rule a contract such as that now before us, and one of these is that the article lent must not be used for any other purpose than that for which its owner loaned it; and another is that the borrower shall take all reasonable care of the article lent. Now, as to the first of these conditions, we have the evidence of the defender and also of his friend, Mr Begg, both as to what took place on the road to Blackwood, and also as to what happened there, and on the way back, up to the time when the accident occurred—[*His Lordship here read the passages quoted above from the evidence of the defender and the witness Begg*]. From all this it appears that the horse was, from the time when the defender received it down to the moment when the accident occurred, being used by the defender for the purpose for which it was lent to him by the pursuer. But further, if we are to believe the evidence of the defender and his friend Mr Bain—and there is not the slightest suggestion that their account of what took place is not entirely to be relied on—then it is, I think, clear that at the time when the accident occurred the defender was taking all reasonable care of the horse, and that this unfortunate occurrence was not attributable to any carelessness or neglect upon his part.

It has, however, been urged by the defender as accounting for the accident that the horse was suffering from a chronic weakness of the forearm, and that this weakness was known both to the pursuer and to Mr Hamilton, the veterinary surgeon, from whom the pursuer purchased the horse, and who attended him for lameness shortly after the pursuer bought him. On this matter Mr Bain in cross-examination says—[*His Lordship here read the passage from the evidence of the pursuer above quoted*]; and Mr Hamilton's account of what he did for the horse is as follows—[*His Lordship read the passage from Mr Hamilton's evidence quoted above*]. Now, we have in addition to this the evidence of the pursuer's brother Donald, who was well acquainted with the horse, and who tells us that it sometimes went lame from bad shoeing. He says—[*His Lordship here read the passage from Donald Bain's evidence quoted above*]; and we have also the account given by Cran, the horse dealer, who says—"I had seen the horse before, and I thought he had been what we call 'junked' in the fore—that is, the muscles strained. It was not a slipped shoulder. It was just general weakness of the fore parts." Now, in the face of all this evidence it is not possible to doubt that this horse had a weakness of the fore parts, and that he had also at various times suffered from the effects of bad shoeing, an evil which if repeated is certain to leave permanent bad effects. It being clear, then, that this horse had a weakness of the fore parts, and also that it had on various occasions gone lame from bad shoeing, I think we have in these two circumstances quite sufficient to account for the horse falling in the manner described by the defender and his friend, and I do not think that we require in the present case to consider further the question of *onus*, nor to call upon the defender (in order that he may escape liability) to show exactly how this accident occurred.

While, therefore, I agree with the Sheriff-Substitute and the Sheriff that this is a narrow case, I am not prepared to adhere to their interlocutors, as I think that the defender has shown that he exercised reasonable care in the use of this horse, and that the accident was not caused by his fault.

Lord Mure—I agree in the result arrived at by your Lordship, and for the reasons stated. It is a matter of common experience that in spite of every care which can be taken of them, horses do sometimes come down, although it is not possible satisfactorily to say why. The Sheriffs both give it as their opinion upon the evidence that the defender at the moment of the accident was driving carefully, and yet they both decide against him, and so make him responsible for what has taken place. I agree with what your Lordship has said, that this is a very narrow case,

but looking to what was known about this horse both by the pursuer and by Hamilton as to the weakness in his forearm, and also as to what was stated by the pursuer's brother Donald about his going lame occasionally when he was not carefully shod, I think we have in these two causes, or in one or other of them, sufficient to explain the accident. The probability is that the horse had a sudden attack of weakness, which would quite account for his falling in the manner described by the defender. Upon these grounds I agree with your Lordship that the interlocutors of the Sheriff-Substitute and of the Sheriff ought to be recalled.

LORD SHAND—As regards the law applicable to a case like the present I think that the Sheriff-Substitute has laid that down very clearly; the *onus* is undoubtedly on the borrower to show that the injury was not caused by carelessness. The question therefore which we have to determine is, did the defender in driving this horse use all reasonable care? The Sheriff-Substitute thinks that the defender has not succeeded in showing that he did so, but I am of the opinion expressed by your Lordships. Both the defender and his friend agree in saying that at the time of the accident the horse was being carefully driven, and with a tight rein, while the condition of the horse showed that he had not been driven too fast. When the horse stumbled and fell no stone could be discovered on the road to account for the accident, and yet the Sheriffs have both found that reasonable care was not used by the defender when he was driving. To my mind the evidence does not support this finding, and I think the reasonable inference to be drawn from it is that the accident was caused partly from the chronic weakness from which it suffered, and partly also from bad shoeing. It is to be kept in mind also that this horse was in the habit of being run in a four-wheeled machine, while on the day of the accident he had, with the pursuer's knowledge, been put into a two-wheeled cart. I therefore agree with your Lordships in thinking that we ought to reverse the interlocutor appealed against.

LORD ADAM—I agree with your Lordship that when an article, or a horse, is borrowed in good condition and is returned damaged, the *onus* is certainly on the borrower to show that he used all reasonable care in the use of the article lent, but it goes no further. That being so, the question comes to be, whether it is proved that the defender here took all reasonable care of this horse? If we believe the defender and his friend every care was taken of this animal, and as there is no suggestion that they are not to be believed, the defender ought, in my opinion, to be assoilzied. I do not think that it falls upon him to prove the specific cause which occasioned the loss, seeing that he has shown that he satisfied us that he used all reasonable care. No stone could be found upon the road, or in the horse's foot, to occasion his falling, but from the evidence we know enough of him to see how this accident might have and probably did occur.

The Court recalled the interlocutor appealed against, and found that the defender had proved that he observed reasonable care in using the horse, and that the accident and injury were not caused by the fault of the defender, and therefore assoilzied the defender.

Counsel for the Appellant—Guthrie Smith—Shaw. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for the Respondent—Vary Campbell—Salvesen. Agent—W. R. Patrick, Solicitor.

Friday, December 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HAMILTON *v.* HARDIE AND OTHERS (GAVIN HARDIE'S EXECUTORS).

Executor—Confirmation—Domicile—Confirmation of Executors Act 1858 (21 *and* 22 *Vict. c.* 56), *sec.* 9—*Sheriff Courts (Scotland) Act* 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 41.

The Sheriff Courts Act 1876, sec. 41, *inter alia*, provides that where it is desired to include in the personal estate of anyone dying domiciled in Scotland personal estate situated in England, the fact that a deceased person died domiciled in Scotland "shall be set forth in the affidavit to the inventory, and it being so set forth therein, shall be sufficient warrant for the sheriff-clerk to insert in the confirmation, or to note thereon, and to sign a statement, that the deceased died domiciled in Scotland, and such a statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland."

A testator died in England possessed of personal property both in England and Scotland. The executors nominated by his settlement, which was in Scottish form and *ex facie* valid, declared that he died domiciled in Scotland, and obtained confirmation from the commissary. Confirmation was opposed by a person who claimed to be one of the next-of-kin, and who averred that the deceased died domiciled in England; that the settlement had been procured from him under constraint, and made no provision for her, although for eighteen years before his death he had allowed her an annuity of £500; and that confirmation in England would facilitate the action which she intended to take to have the settlement set aside. No allegation of impecuniosity was made against the trustees, and it was not suggested that the estate would suffer by their administration. In an appeal, *held* that in view of the provisions of the statute warrant to issue confirmation had been properly granted, and that no sufficient reasons had been alleged for staying confirmation.

The Confirmation of Executors Act 1858, sec. 9, provides—"From and after the date hereof it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland, or both: Provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by