Thursday, October 29.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

SOMERVILLE *v.* HARDIE.

Reparation — Negligence — Hatchway in Floor of Shop Unfenced — Contributory Negligence.

A hatchway or trap in the floor of a shop was situated about a foot from the edge of the counter and 5 feet 6 inches from the inside of the entrance door of the shop. It was left open during business hours, with its cover propped up against a box on the side next the entrance door in such a way as to leave the opening in the shadow. A customer fell down the hatchway and was injured. In an action by him against the occupier of the shop, *held* (1) that the defender was in fault in leaving the hatchway open and unguarded, and (2) (*diss.* Lord Moncreiff) that the pursuer's claim was not met by a plea of contributory negligence founded on the fact that he had got into the space between the counter and the hatchway, not in the ordinary course as a customer, but while indulging in horse-play with a boy in the defender's employment.

This was an action brought in the Sheriff Court of Lanarkshire at Glasgow by Thomas Ferguson Somerville, pattern maker, Glasgow, against William Bennett Hardie, shopkeeper there. The pursuer craved decree for £50 as damages for injuries sustained by him through falling down a trap door in the floor of the defender's shop in Crown Street, South Side, Glasgow.

In the floor of the shop there was a trap-door opposite the counter and situated at the back of the shop, 5 feet 6½ inches from the entrance and within 11½ inches from the outer edge of the counter. The hatch was itself 2 feet 10½ inches long. The cover of the hatch opened backwards towards the door of the shop, and it was propped up against a box which occupied the space between the trap-door and the wall opposite the counter, so as to leave the opening of the hatch in the shadow. The cover of the hatch projected above the box about 8 inches and beyond it about half its length. In the front part of the shop the space available for customers between the counter and the opposite wall was about 4 feet. There was nothing to prevent a customer from getting into the narrow space between the counter and the opening, but there were no goods lying for sale on the part of the counter opposite to it, and it was not intended to be used by customers.

On the afternoon of Saturday 28th March 1896 the pursuer, along with a companion, entered the defender's shop for the purpose of making a purchase. At that time there was a woman at the counter to whom the defender was attending, and the defender's assistant, a boy of 14, named Knox, was standing at the door of the shop talking to another boy. At the door the pursuer addressed this boy and asked him whether he had no work to do. He then caught hold of him by the ear and led him into the space between the trap-door and the counter. The pursuer stopped about the middle of the opening, but Knox went behind the counter. The pursuer and the boy continued laughing and joking together while the woman was being served. The pursuer's companion was also standing in the shop at this time between the pursuer and the woman, making three customers in all. When the defender was at liberty to attend to him the pursuer turned to move to the front part of the counter, and in doing so, fell down the opening of the hatch. He was caught by the elbow on the opposite side of the hatch and dislocated his shoulder.

Before they came to defender's shop the pursuer and his friend had visited a public-house and had a glass of whisky and half-a-pint of beer each. But the doctor who attended to him immediately after the accident deponed that the pursuer was perfectly sober, that this was shown by the fact that the chloroform administered took effect, and that he would not have administered chloroform if the pursuer had been incapable from drink.

A boy who had come to the shop as a customer had on a previous occasion fallen down this hatchway.

The defenders pleaded—"(1) The accident to the pursuer having been the result of his his own negligence and carelessness, the defender should be assoilzied with expenses. (2) The pursuer having by his own negligence contributed to the accident in question, defender is entitled to absolvitor.

After a proof, the effect of which so far as not already stated appears from the judgments, the Sheriff-Substitute (BALFOUR) issued an interlocutor, whereby, after sundry findings in fact, he found as follows—"Finds that the pursuer was not drunk, but he was affected by liquor, having had a glass of whisky and a glass of beer immediately before the accident, and he was in a frolicsome humour: Finds that on the occasion in question, the pursuer, although an ordinary customer of the shop and intending to make a purchase, was not acting as a customer should have acted, but he led both the boy and himself into danger by dragging the boy by the ear into the narrow passage: Finds that to an ordinary customer conducting himself properly the hatch was little source of danger, especially when only three customers had to be served: Finds that the pursuer brought the accident on himself by his frolicsome and irregular conduct, and the defender is not to blame for it: Therefore assoilzies the defender from the conclusions of the action, and decerns: Finds the pursuer liable to him in expenses," &c.

He added the following note—"If I believed the pursuer's story I would probably find the defender liable in damages. If he had acted as an ordinary customer on the

occasion, and had got into the narrow space between the hatch and the counter while waiting to be served, I think the defender might have been liable for his falling into the hatch, because a customer should not have been allowed to stand in the narrow space without at least being cautioned. But I have no confidence whatever in the pursuer's story, and I believe entirely in the version of the facts given by the defender and his witnesses. It would be absurd to hold that where a man goes into a shop and drags the shop boy by the ear into a passage near a hatch which is not intended for customers, the shopkeeper is liable in damages for his falling down the hatch. There was no occasion for the pursuer to be in that part of the shop at all. There was plenty of room for him at the counter, away altogether from the hatch, and he got into the narrow passage through his own silly conduct."

The pursuer appealed to the Second Division of the Court of Session, and argued —(1) The accident was due to the fault of the defender. There was fault on his part in respect that he ought not to have left a hatchway in the floor of his shop, in front of and close to the counter, without having it fenced in some way, especially considering that owing to the very restricted space available for customers, it was only to be expected that when waiting at the counter to be served, they might get into the narrow space between the hatchway and the counter. Access to the narrow space could have been easily prevented by a bar across the entrance to it. At least the defender ought to have warned the pursuer when he saw him standing in the narrow space. The criterion in such cases always was this, "Was the dangerous place contiguous to a place where the injured person had a right to be."—*Prentices* v. *Assets Co., Limited*, Feb. 21, 1889, 17 R. 484. That was the case here. There was here practically an invitation to stand in the narrow space, inasmuch as a person standing there was still at the counter, and there was nothing to prevent him from getting there. At such a place there ought not to have been a hatchway immediately behind the place where a customer might stand and had a right to stand—*Brady* v. *Parker*, June 7, 1887, 14 R. 783, *per* Lord Craighill at page 789. (2) There was no contributory negligence on the part of the pursuer. His conduct towards the boy was not negligence. But, moreover, when the accident occurred he was not even frolicking with the boy. He was only laughing and joking with him. He came into the shop as a customer, and when the accident occurred he was waiting at the counter to be served. His conduct towards the boy had nothing to do with the accident. Even if the pursuer was negligent in respect to his conduct towards the boy, he was not barred from recovering for an accident due to the negligence of the defender, unless he could have avoided the consequences of the defender's negligence by the use of ordinary care —*Davies* v. *Mann*, Nov. 4, 1842, 10 M. & W. 546. Here there was nothing to warn the pursuer that there was a hatchway so near the counter, and he had a perfect right to stand at any part of the counter to which he had access. The case most resembling the present was *Cairns* v. *Boyd*, June 5, 1879, 6 R. 1004.

Argued for the defender—This was a pure jury question. The verdict was for the defender, and in such cases the Court was usually unwilling to alter the decision of the judge who tried the case. There was really no question of law in issue. Apart from that, however, there was no fault proved against the defender. Even supposing that this was a dangerous place to anyone going into the narrow space, it was not a place dangerous to customers. Customers had no occasion to go there. There was plenty of room for them in the shop elsewhere. There were no goods exposed for sale on the part of the counter near the hatch. Further, there was no danger which the pursuer with ordinary care could not have seen and avoided. The lid of the hatch, projecting up above the box, should have shown him that there was a hatch behind, or should at least have put him on his guard. So also the fact that he had to squeeze into the narrow space, should have warned him to look where he was going. His failure to observe the kind of place he was going into, as he might easily have done if he had not been frolicking with the boy, was the cause of the accident, or at least amounted to negligence contributing thereto. There was no necessity for a customer going where he did, and as a fact he did not go there as a customer, but in order to continue his horseplay with the boy. It would be a gross hardship on the defender to say that he was not to have a hatchway in such a position without fencing it. As to the previous accident, the circumstances did not sufficiently appear to make it a safe ground for deciding against the defender. The cases quoted were all remote from the present.

At advising—

LORD JUSTICE-CLERK—[*After describing the shop and the position of the trap-door*]—The first question which we have to consider is, was that a proper state of things, so that if a person who was present as an ordinary customer fell through the trap-door, no blame would attach to the owner of the shop. I have given this question careful consideration, and have ultimately come to be of a definite opinion that it was not a proper state of things. Any customer coming into the shop would find a box upon the floor supporting a board, and suppose there were people filling up the shop, or suppose he had to give way to other customers coming in, he might quite well move up the shop with his face to the counter, and get between the counter and this board, without any idea that there was a pit open behind his feet. There was no protection to keep such a customer from falling into the hatchway except the board and a box which kept the board upright. The hatchway was necessarily in shade owing to the position of the counter, which came be-

tween it and the window, and the board itself, which came between it and the glass door. There was therefore nothing to call the attention of a customer to the fact that there was a hole in the floor. Indeed, that seems to have been the view of the Sheriff-Substitute, for he says—"If he (the pursuer) had acted as an ordinary customer on the occasion, and had got into the narrow space between the hatch and the counter while waiting to be served, I think the defender might have been liable for his falling into the hatch, because a customer should not have been allowed to stand in the narrow space without at least being cautioned." I agree in that. I hold that an ordinary customer standing where the pursuer did, and falling into the hole, would have had a good claim against the defender. The only remaining question therefore is, whether the pursuer did anything that deprives him of that claim. Now, the allegation is that he was not in a fit state to look after himself, that he had been drinking, and that accordingly he himself was to blame for the accident that occurred to him. That is a charge which must be clearly proved. I am of opinion that it is not proved. The Sheriff-Substitute does not hold that it is proved, and the evidence does not support it. The woman who was in the shop says—"I did not see anything in his conduct to show that he was the worse of drink, except that he was carrying on, and coming in arm-in-arm with the other man to the shop, and then laughing and joking at the other end of the counter." There is no counter-evidence. But in my opinion the strongest, and indeed the conclusive evidence on this matter is that of the doctor who examined him immediately after the accident. He has necessarily experience in such matters. It is his business to look into such cases and to distinguish drunkenness from other causes of confusion. He says that the pursuer was perfectly sober, and there is evidence that such was his own belief at the time, because he put the pursuer under chloroform, which he says he would not have done if the pursuer had been the worse of drink. The pursuer therefore was not unfit to look after himself. It is said that he was in a frolicsome humour, and took the shop boy by the ear. But it may very well be that he may have done so without being drunk, and without doing anything to deprive him of his claim against the defender if the defender was in fault, To take a boy by the ear in a frolicsome humour is not fault or negligence. It is not disputed that the pursuer came into the shop to buy. He says he moved up the counter a little to let a woman in to the counter who was beckoned forward by the defender. It may be that this was not necessary, but he may have moved so as to give her more room. When he had moved up he still stood at the counter although the hole of the hatchway was just behind him. Now, when he was standing waiting to be served as a customer at the counter, in such a position, as the Sheriff-Substitute says, he should have been cautioned. He certainly should have been cautioned by the defender or his assistant, who, it is proved, saw him standing there and was speaking to him at the time. But he was allowed to stand in such a position that by moving his foot slightly he fell into the hole. It was certainly no reason for not cautioning him that he was in a frolicsome humour and had taken a boy by the ear.

I am therefore unable to hold that the shop was in a proper condition, and I am also unable to hold that if the defender would have been liable to an ordinary customer, the pursuer did anything to deprive himself of his claim.

I have considered the question of damages, and I would move your Lordships to award the sum of twenty-five pounds.

LORD YOUNG—This is a case of the kind and class in which we are especially unwilling to interfere with the judgment of the Sheriff-Substitute. Having, as the result of the hearing, formed an impression adverse to his judgment in this case, I have considered the case with care and anxiety, reading the evidence carefully. The impression which I formed after the argument has been confirmed into a distinct opinion that the judgment is erroneous and cannot stand.

With reference to the question—which is the first question in the case—whether the floor was in a safe condition—that is, safe for customers who were entitled and invited to come into the shop—upon this question there is, in my opinion, no room for doubt. The Sheriff-Substitute himself is of opinion that the floor of the shop was not in a proper state. He says, no doubt, that "to an ordinary customer conducting himself properly the hatch was little source of danger, especially when there were only a few people in the shop," but he is of opinion that the shop was not in a safe condition. It was a small shop. I do not need to describe the hatchway, but it was situated only 12 inches from the counter, and the only, but quite distinct and reliable, evidence is to the effect that it was dangerous, and that evidence is uncontradicted. That is the evidence of Robert Hay, the architect who made the plan. He says—"If there was a box on which the hatchway door was resting, that would mislead customers. I would consider that if the hatch was to be left open during business hours it would be dangerous to customers. That danger could have been obviated by putting something in front of the opening between the counter and the hatchway, so that it would have been impossible for the customers to get through." The defender explains why the hatchway was left open, and why nothing was done to prevent customers getting into the narrow space. He says—"The narrow space is not intended for customers at all; we need it for ourselves; but I fancy nobody would attempt to go through there. I cure my hams down stairs. For ventilation purposes that hatchway is open night and day, unless when we are getting in anything, and we then require to put it down to let the goods get past, but after that it is put up again."

But it was used as a passage. The defender says he used to walk sideways between it and the counter, but he did not expect customers to do so—but a customer did do so. I think this was a dangerous state of matters. If a customer coming in failed to see the hole, or omitted to remember that there was a hole, and came along the counter as far as the narrow place, if he attempted to turn when he was in that position it might have cost him his life. In the present case the pursuer only dislocated his shoulder, but his injuries might have been much more serious and even fatal. That is a danger to which customers ought not to be exposed.

Of course, a customer may deprive himself of his right to claim damages for injuries resulting from the faulty condition of the shop if such injuries are attributable to notable misconduct or impropriety of conduct on his part. I do not think the pursuer was guilty of any such conduct on this occasion. I would not even be inclined to characterise his conduct as even frolicsome. But even if it could properly be so characterised, I do not think that the taking of a boy by the ear would be notable misconduct of such a class as to prevent him from suing for damages for injuries caused by the state of the floor. What are the facts? It appears that the pursuer came into the shop to buy some lard. Before he came in the defender and the shop-boy were playing dominoes. When the woman came in they left off playing dominoes. The boy says he went to the door to talk to a friend. When the pursuer came in and found the boy there he seems to have used a word of which we cannot approve, and told him to go on with his work. But that was not such impropriety of conduct as to deprive him of his claim against the defender. Then he caught hold of the boy by the ear. The Sheriff-Substitute uses the expression "dragging the boy by the ear." That was not proper language to describe what happened. So far as appears, the boy was not hurt at all. The woman White says the pursuer was "laughing and joking at the end of the counter" with the boy. The boy went round inside, and the pursuer remained on the other side and was laughing with the boy. The master was there and saw them, and he did not say, "Come out of that passage, it is only for our use." The pursuer took up a knife and drew it along the counter. The Sheriff-Substitute says he was carving on the counter, but that was quite an exaggeration. The pursuer, in all that he did, was not acting like a drunk man or a man affected by drink. What happened was, that as he was standing at the counter joking with the boy, and waiting to be served, and not knowing or not remembering that there was an open hatchway behind him, he put back his foot and met with his accident. It is not doubtful that he met with the accident in consequence of the state of the floor. As I have said, I think the state of the floor was dangerous. I do not think that his conduct was characterised by any such impropriety as would deprive him of his claim to damages for the accident. In accordance, therefore, with your Lordship, and in accordance with the Sheriff-Substitute, and with the only evidence on that matter in the case, I think that to have a hatchway open to a passage, which was open to customers, was dangerous and improper. Affirming that proposition, and negativing the proposition that there was any such impropriety in the conduct of the pursuer as to deprive him of his claim, I am bound in law to hold that he is entitled to damages from the defender for the injuries he has sustained. I think the sum of £25 is a very moderate amount at which to assess these damages.

LORD TRAYNER—If I could concur in the finding of the Sheriff-Substitute that "the pursuer brought the accident on himself by his frolicsome and irregular conduct," I should probably concur in his judgment absolving the defender. But I think the Sheriff-Substitute's finding is wrong. The pursuer's conduct may perhaps be described as frolicsome and irregular, but I can find no connection between it and what subsequently happened. The frolic with the boy had ceased before the accident in question took place, and the accident was not the result of the frolic. The frolic, perhaps, led the pursuer further into the defender's shop than he would otherwise have gone. But it did not take him beyond the area of the shop, nor to any part of the defender's premises to which he might not legitimately go as an ordinary customer. He was still in front of the counter at which the defender did business with his customers, and there was nothing to bar the pursuer from taking, as a customer, the position which he did. I think the defender was to blame in having an unprotected open hatchway in his shop to which all concerned were invited to come. He knew it was dangerous because a boy had fallen into it before. I think, therefore, that the defender is liable for the damage suffered by the pursuer, and I agree with your Lordship as to the amount which should be awarded.

LORD MONCREIFF—I am of opinion that the Sheriff's judgment should not be disturbed. It is possible that a customer might have been elbowed into the narrow passage between the counter and the trap without being aware that he had left the safe part of the floor, and that the trap was open behind him, and might thus, without fault on his part, have fallen backwards and been injured. Even this is improbable, at least in the case of a grown man, the entrance to the passage being so narrow—only 10¼ to 12½ inches. If such an accident had occurred we should have had to decide whether the defender was in fault in leaving the trap open.

But in this case, even assuming fault on the part of the defender, the pursuer, with the exercise of ordinary care, might have avoided the risk. He must or should have seen the open lid off the trap; and as he could only go into the narrow passage

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

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

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

The Court pronounced the following interlocutor:—

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

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

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

Saturday, October 31.

FIRST DIVISION.

[Sheriff of Lanarkshire.

M'INTOSH *v.* WADDELL.

Reparation — Negligence — Leaving Horse Unattended in Street.

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

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

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

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

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

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

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

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

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

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