they were allotted has not been filed, and therefore, after the defender has paid £1 for each to the pursuer on the assumption that they are fully paid, he may still be liable to pay the same sum to the company or a liquidator on the contrary assumption. I think that in these circumstances the doctrine laid down in *Arnot's* case ought to govern our decision. It is pointed out in that case that the statute does not throw upon any particular party to the contract under which shares are to be issued the obligation of filing it with the registrar, but that is for those who seek to enforce a contract to take shares to put themselves in a position to complete that contract. Now, there is a contract between the parties to this action that the pursuer shall acquire, and that the defender when called upon shall take over, shares that in fact and law are to be considered as fully paid, and it is for the pursuer who seeks to enforce that contract to show that everything has been done effectually to make the shares fully paid-up. But that has not been done. The fact is, as Lord Justice Bowen puts it in *Arnot's* case, that the matter has been left in an inchoate form, that the steps have not been taken which are necessary to complete the contract to give fully paid-up shares, and therefore I think the pursuer cannot have decree for specific performance. It is clear enough that the pursuer might himself have refused on the same ground to take the shares when they were allotted to him by the company, and if he had done so at the time of allotment there would probably have been no difficulty in rectifying the omission to register which left them subject to liability. But he did not stand on his right to insist that the contract should be registered before the shares were issued, and he has thus put himself in the position of holding shares which he cannot deal with as being paid in law, although he has in fact given value for them. There can, I think, be no question that if he were to tender them in execution of a contract to sell and transfer fully paid shares, the buyer would not be bound to take them; and the defender is in exactly the same position, unless it can be said either that the contract was for particular shares which he was bound to take whether fully paid or not, or that he is himself responsible for the failure to make them fully paid-up shares. I do not think either of these propositions can be successfully maintained. The contract, as I read it, was that the pursuer should acquire shares to which no liability should attach, and that the defender should take them over at par value. But the pursuer has not put himself in a position to tender shares answering to the contract, and the defender cannot be required to accept shares which will not give him the benefit for which he stipulated, but will involve him in a liability which the contract shows that he was not intended to incur.

Lord Adam, Lord M'Laren, and the Lord President concurred.

The Court recalled the interlocutor of the Lord Ordinary, in so far as regards the finding quoted above, "and in place thereof find that under and by virtue of section 25 of the Companies Act 1867 the shares tendered by the pursuer as in implement of the agreement libelled must be deemed to be held subject to the payment of the whole amount thereof in cash: *Quoad ultra* adhere."

Counsel for the Pursuer—Guthrie, Q.C.—M'Lennan—T. B. Morison. Agents—Auld, Stewart, & Anderson, W.S.

Counsel for the Defender—Balfour, Q.C.—Wilton. Agent—W. Marshall Henderson, S.S.C.

Friday, June 23.

SECOND DIVISION.

[Sheriff of Forfar.

ALEXANDER *v.* PHILLIP.

Reparation—Negligence—Duty to Public—Driving Accident—Running Over Child Playing in Street.

In an action of damages for the death of a child who had been run over while playing in the street, the onus is upon the pursuer to prove that the driver was in fault, and not upon the driver to prove that the occurrence was due to inevitable accident, or some cause which he could not reasonably be expected to anticipate.

Circumstances in which *held* (*dub.* Lord Justice-Clerk) that the driver of a dog-cart who ran over a child of six who was playing in the street was in fault and was consequently liable in damages.

This was an action brought in the Sheriff Court at Dundee by James Symers Alexander, labourer, Dundee, against David Phillip, farmer, Balcalk, Tealing, near Dundee, in which the pursuer craved decree for £500 as damages for the death of his son aged six years.

The pursuer averred—"(Cond. 3) On or about 26th April 1898 the pursuer's said son James Symers Alexander junior was playing along with a number of other boys in Princes Street, Dundee. The defender was in charge of a horse and dog-cart or other carriage in said Princes Street, Dundee, on or about said 26th April 1898, and the defender in driving said horse and dog-cart or other carriage north-east-wards along said street, culpably, carelessly, and recklessly knocked down and ran over the pursuer's said son, who in consequence thereof sustained injuries from which he died on the following day. The defender knocked down and ran over the pursuer's said child in consequence of (1) his culpably, carelessly, and recklessly driving said horse and dog-cart or other carriage along said

street; (2) his not keeping a proper look-out while he was driving said horse and dog-cart or other carriage along said street; and (3) his being drunk while in charge of said horse and dog-cart or other carriage, and therefore unable to take proper charge of said horse and dog-cart or other carriage."

The defender denied that he was driving recklessly and that he was drunk. He averred that he was driving at an ordinary trot, that he saw the children playing in the street, that he shouted to them, and that the children in the centre of the street went to the side leaving room for the defender to pass; that if the pursuer's son had stood still the trap would have passed him, but that just as it was about to pass the pursuer's son rushed or was pulled in front of the horse, and was knocked down; that it had now come to the defender's knowledge that the boys were playing with a rope stretched across the street, which the defender could not see on account of the darkness, that all the boys on the side of the street on which the pursuer's son was, with the exception of the pursuer's son, let go the rope, that the boys on the other side of the street continued pulling the rope, and that the pursuer's son was pulled in front of the trap just as the horse was upon the rope.

A proof was allowed.

The nature of the facts so far as material sufficiently appears from the interlocutors and notes of the Sheriff-Substitute and the Sheriff and the opinions of the Judges.

On 21st December 1898 the Sheriff-Substitute (Campbell Smith) issued the following interlocutor:—"Finds that the defender is tenant of the farm of Balcalk, in the parish of Tealing, about 7 miles from Dundee, and that, as is usual with farmers in the neighbourhood, he from time to time visits Dundee for the purpose of business: Finds that on the 26th April 1898 he made one of his occasional business visits, having travelled to town by means of a dog-cart drawn by one horse, he acting as driver: Finds that he put up his horse and conveyance at the Eagle Inn stables, spent the day meeting friends, farmers, and fleshers, dined in a temperance restaurant, visited several public-houses, and according to his statement, neither supplemented nor contradicted but elaborately corroborated, drank at intervals not more than 1¾ glasses of whisky and a half glass of port: Finds that he left the Eagle Inn about a quarter past eight, and set off for home accompanied by the joiner of the district, to whom he had early in the day offered a lift on the way to Tealing: Finds that in passing along Princes Street, Dundee, his horse was going at a rapid pace, described by some witnesses as 'galloping,' by others as a 'smart trot;' that in Princes Street a band of boys, about fifteen in number, were, or shortly before had been, amusing themselves marching down the street holding on to a rope in front of them; that the pursuer's child, a boy aged six, was about the centre of the line and near the middle of the street; that the boys did not notice the approach of the defender's horse until it was close upon them; that the defender did not shout to them or try to stop the horse until it was too late; that after the boy's body had been passed over by the right wheel, the horse was pulled up with a jerk, with the result that the horse backed and the said wheel passed over the boy's body other two times: Finds that the effect of the wheel so passing was to burst one of the small intestines, set up peritonitis, and so caused the child's death within twenty-four hours: Finds that his death was due to the fault of the defender, and to the loss, injury, and damage of the pursuer: Assesses the damage at £85 sterling, for which decerns against defender: Finds the pursuer entitled to expenses."

Note.—"The line of children drawn up or marching down the street towards the defender's trotting horse ought to have been seen by him forty or fifty yards away—not improbably twice that distance. The children of all large towns, through their carelessness and foolhardy adventurousness, are a torment to all drivers, more especially to the driver of every carriage that has the slightest semblance of superior respectability about it. But, nevertheless, I hold that, both by law and humanity, a driver is bound to take the utmost care that he do them no harm. The utmost care is sometimes insufficient to save a child that plunges blindly and rashly before a horse, even though its pace be a walking pace. The question raised by the defence is, Did the defender exercise the utmost care? I cannot come to the conclusion that he did. He saw the children in good time to reduce the speed of his horse, or to stop it. But he drove on expecting the children to 'burst up.' He had no right to trust to any such expectation. The chances turned out to be greatly in favour of the accuracy of his expectation, for all the children 'burst up' and escaped but one—the youngest of them all I think; but I hold that with his eyes open he had no right to risk the obvious chance, however slight, of maiming or killing a human being. Why he did it I can only conjecture, but I feel certain that he did it. The most probable explanation, I fancy, is that he had either too much or too little drink. I do not think the horse would have been so destitute of sagacity as to have run down the children had the driver been drunk and incapable. I believe his market-day 'halfs' in public-houses had not affected him beyond elevating him into an excited foolhardy atmosphere. No doubt the police officers who saw him after the occurrence when he was taken into custody thought he was drunk—decidedly drunk—and the charge first recorded against him by the police was being drunk when in charge of a horse. I do not doubt what they say about his symptoms, but I believe these symptoms were largely due to excitement and vexation for what had happened rather than to alcohol. All his friends who saw him drinking that day say he was sober, and I believe he was at least as sober as most of

them, and about as sober as any decent temperate farmer can be who is forced to transact business in public-houses on a market day. Nothing that I saw or heard leads me to doubt the defender's respectability, or to find that there has been proved against him any fault but the one. His manner, so far as I saw, was that of an honest witness who believed all he said in the witness-box. There is one important point in his evidence in which he agreed with or adopted the evidence of an elder brother of the deceased boy and one of his companions in this unfortunate street amusement, to the effect that his little brother was knocked down by the step of the dog-cart before he was run over, and I find it necessary to say that this evidence I do not believe. I do believe the evidence of the first witnesses—three women who were not examined at the criminal trial, all eye-witnesses to the occurrence—who concur in saying that the boy was knocked down by the fore leg of the horse. Their evidence is confirmed by some witnesses for the defence in another point not proved at the criminal trial, this second point being that the wheel passed three times over the boy's body, due for two times, I do not doubt, to the state of flurry into which the defender was cast by the accident. The evidence of these three women is not subject to any doubt that I can think of. It is, however, indicated to be most probably true by the position of the boy's body at the time the wheel passed over about the middle of it. He was lying on his back with his head to the right hand pavement and his feet on the part of the street over which the horse had passed. That a blow from the dogcart step could have thrown him into that position in regard to the wheel is quite inconceivable. So far as I could see, the boys examined did not mean to say anything that was not true, but some of them were as unintelligent as boys engaged in such play might be expected to be, and the evidence of all of them bore traces of that confusion of observation and of memory that affects nearlyevery spectator of a tragedy, more especially among the young."

The defender appealed to the Sheriff (JOHNSTON), who on 20th March 1899 issued the following interlocutor:—"Recals the interlocutor appealed against: Finds (1) that on 26th April last the defender left the Eagle Inn, Dundee, between 8 and 8·30 P.M. in his own dogcart, accompanied by William Mortimer, joiner, Brighty, with the intention of returning home to Balcalk, Tealing: (2) That it is not proved that the defender, who was driving himself, was so much the worse of liquor as to be incapable of taking charge of a horse and vehicle: (3) That in driving up King Street and Princes Street the defender was not driving recklessly, but was driving at a reasonable and proper pace: (4) That in Princes Street the defender, about 8·30 P.M., came upon a large number of boys who were parading the street, having a rope stretched from side to side of the roadway, to which they were all holding on: (5) That when the defender's horse and dogcart were observed approaching, which was not until the horse was close upon them, the boys at one side let go the rope, and the boys at the other side gave it a jerk, with the result that the pursuer's son, James Alexander, aged six years, who was in the middle of the street, and did not let go the rope. was pulled in front of the horse, which knocked him over, and that the off-wheel of the dog-cart passed over his body injuring him internally so severely that he died on the following day; (6) that the rope was not visible to the defender, who in the darkness had no reason to suspect that the boys were doing otherwise than playing loose on the road before him; (7) that had the pursuer's son James not been pulled in by the rope, as above found, the defender's dog-cart would have passed clear of him, as it did of the other boys; (8) but that it is not proved that the defender took sufficient precaution to avoid accident: Therefore finds him in law liable for the death of the said James Alexander, and in *solatium* to the pursuer as his father: Assesses the same at £50: Decerns and ordains the defender to make payment to the pursuer of said sum of £50, with interest at the rate of 5 per cent. per annum from the date hereof: Finds the pursuer entitled to expenses," &c.

Note.—"I have found the decision of this case not devoid of difficulty, and while I have came to the same conclusion as the Sheriff-Substitute, I have done so on different grounds.

"I hold that the defender was at the time in question driving at a reasonable and proper pace.

"That the boy James Alexander was pulled in front of the horse, which knocked him down by a jerk given by his companions to the rope of which he had hold.

"That the rope was invisible to the defender, and that he had no reason to anticipate that the boy would by any latent cause be dragged in front of his horse.

"That but for the jerk of the rope the defender's horse and trap would have cleared the child.

"That the defender was not in the state of drink represented by the police, though he had a glass or two of whisky during the afternoon.

"In these circumstances I should have been inclined to assoilzie the defender, but that I think the authority of the cases *Clerk* v. *Petrie*, 6 R. 1076, and *Auld* v. *M'Bey*, 8 R. 495, require me to give judgment against him, inasmuch as if he had slackened his pace to allow time for the children to clear more completely out of his way, the accident, notwithstanding the rope, might have been avoided.

"As the result of the accident is one which I am sure the defender has keenly felt, as his very proper conduct after he became aware of what had occurred evidences, I think it only due to him to explain my grounds of judgment more fully.

"On 26th April 1898 the defender had driven into market from his farm, seven miles to the north-east of Dundee, in his

dog-cart, and started for home from the Eagle Inn a little after eight o'clock. His history during the day is told by those who were in his company or in contact with him, hardly any of whom are cross-examined, and I am satisfied that, though he had partaken of refreshments three or four times during the afternoon and evening, he had done so temperately, and I do not think that there is any ground for saying that he was not capable of taking charge of his horse and conveyance. I think that the police account of his condition is greatly exaggerated and inconsistent with their action. For I cannot understand how a man who was so drunk as they declare the defender to have been at nine o'clock, and who had just run over a boy, should have been dismissed two or even three hours afterwards to drive himself home through the same streets, and, in the knowledge of the police, seven miles into the country.

"With Mortimer, a neighbour from Tealing, the defender started to drive home *via* Panmure Street, King Street, Princes Street, Albert Street, and so on to Arbroath Road. From King Street on this route is all collar work, and I find no reliable evidence that the defender was driving at anything but an ordinary trot. I discard entirely the evidence of the first three witnesses. Neighbours who have not been examined in a criminal trial, and who are brought up in a subsequent civil case arising out of the same circumstances, are seldom very reliable witnesses, and these three give such an incredible statement that I think their whole evidence worthless. They say in one breath that defender was galloping up the street, and in the next that, having knocked down and run over the child, he pulled up so sharp —one of them makes it 12 to 18 inches—that his horse backed the wheels over the child, and then came forward over him a third time. The rest of the evidence satisfies me that the defender was going at a reasonable and proper pace, and that his wheel only once passed over the boy.

"While defender was driving up the street, a parcel of boys, variously estimated, but probably fifteen or sixteen in number, were parading the roadway with a rope stretched from side to side, which those at the pavement side were hauling tight, while others, including the deceased James Alexander, aged six years, were holding on to the middle. At 8·30 of an April evening, I think it reasonable to believe that this rope was invisible to the defender, as it was to others, and that consequently he did not know what the children were doing, or appreciate the consequent danger they were in of being run over.

"What actually did happen was that when the defender's vehicle was heard or seen—which from the intentness of their play was not till it was close on them—the boys in the middle of the street scattered more or less, while those at one end let go the rope, which those at the other end pulled, with the result that the deceased, who was too young too look after himself, and did not let go, was pulled in front of the horse, knocked down by its knees, and was consequently run over, and received the internal injuries of which he died. Had he let go the rope and stood still even, he would not have been touched.

"Such proceedings on the part of children are traps for even the wariest of travellers, and it is somewhat astounding that such a game could have been permitted to go on in a main thoroughfare evidently for some time among children of six years old and upwards without either bystanders or police interfering for their protection. The instant the accident happens there is a crowd ready to shout and run after the driver who has had the misfortune to run over a child, and before he has gone a 100 yards he is in the hands of a police inspector, a constable, and two detectives. But nothing is done either by passers-by or by police to stop in time the dangerous performance, and I confess I blame the passers-by and bystanders much more than the police, whose difficulties in this matter in Dundee I fully appreciate. Accordingly, I should have been inclined to hold that the child was thrown under his wheels by a cause which he did not and could not anticipate, the defender was not civilly liable, and he has already been acquitted from any criminal charge.

"But the one person on whom the law lays any responsibility for children let loose on a street is a driver, and he is bound to show that he could not by possibility have avoided an accident. I do not think that the defender has discharged that onus. He and his companion both say that he shouted, but though I believe them, I think that it is clear that his shout was not attended to, and that he drove on too much in the faith that the children would scatter before he came up to them. Though the immediate cause of the accident was latent, I cannot say that if the defender had exercised more caution and less faith, the regrettable consequence of that latent cause might not have been avoided, and I am therefore constrained to find him liable for the boy's death, but I think that £50 is in the circumstances an adequate reward of *solatium*."

The defender appealed, and argued—The defender was only liable for fault. No fault had been found against him. He could not have done any more than he did. His horse was under control. He was driving in the middle of the street. He was quite sober. He was going at a moderate pace. He drew up at once, The cause of the accident was that the child was dragged in front of the horse by the rope which the defender did not and could not see, and in a way which no one could have foreseen. Taking the Sheriff's first seven findings in fact as correct, which the defender was quite content to do, there was no ground for holding him liable. The defender had taken sufficient precautions to avoid accident. He was not bound to prove that he could not possibly have avoided an accident.

Argued for the pursuer--It was proved that the defender was drunk. He saw the children 30 yards off. He did nothing till he was within 10 or 15 yards off them, when he

shouted. The children paid no attention. He went on without reducing the pace, trusting to the children breaking up. He should have pulled up when he saw that the children paid no attention to his shout; whenever he saw the children all across the street he ought to have got his horse to such a pace that he could stop at once. Now, if he was only going at a smart trot, he could not have had his horse sufficiently under control to stop at once. This was not a case of a child rushing suddenly out into the street. The child here was out in the street, and did not get out of the defender's way in time. It might be conceded that even if the defender was drunk and driving too fast, he would not be liable if it was proved that the child was pulled in front of the horse by the rope. But this was not proved; indeed, it was proved that it was not so. The cause of the accident here was that the defender did not take reasonable precautions to ensure the safety of the children, as he was bound to do. Authority referred to — *Auld* v. *M'Bey*, February 17, 1881, 8 R. 495.

Lord Young—The pursuer in this case was the father of a boy, six years old, who was run over and killed in Princes Street, Dundee on 26th April last, and the action is against the defender, a farmer in the neighbourhood of Dundee, who was driving a dog-cart and horse, which ran against the child, knocked him down, and so caused his death. The pursuer's ground of action, and his only ground, is stated in the third article of his condescendence, which is in these terms—[*His Lordship quoted the third article*]. Now, there is no other ground of action averred on record, and to warrant a judgment in favour of the pursuer, we must, on the evidence before us, affirm facts within the statement which I have first read, sufficient to show fault on the part of the defender, and to show also that that fault led to the death of the boy.

The case is certainly a perplexing one from the judgments of the Sheriff-Substitute and the Sheriff, which although leading to the same result, except as regards the amount of damages, are stated on very different grounds, and show that the Sheriff-Substitute and the Sheriff took very different views of the import and effect of the evidence. I am not going into the evidence in detail, but I may say generally, with reference to the differing views of the evidence taken by the two learned Sheriffs, that if the evidence of the first three witnesses and of the police officers be taken for true, or indeed for other than false to such an extent that one cannot account for it othewise than as wilful falsehood on their part, then the pursuer's ground of action, as I have read it, is in substance established, for the first three witnesses say that the defender was driving recklessly and carelessly on the occasion in question, and the police officers say that he was intoxicated. Even if these facts are held to be established, I do not say that it might not nevertheless be shown to be the case that the child was in such a position that the defender could not by any possibility have avoided running it over and so injuring it. I do not say that it is inconceivable that such a case may not be established, notwithstanding that the defender was driving carelessly and was intoxicated, but such a case, though conceivable, will not readily be held as established.

The Sheriff-Substitute's interlocutor is rather curious in its details—[*His Lordship read the interlocutor and note*].

It therefore appears from the Sheriff-Substitute's interlocutor and note that he was of opinion that the defender was the worse of drink, although not much the worse, and that he was driving carelessly and not keeping a proper look-out, and the Sheriff-Substitute comes to these conclusions, believing the evidence of the first three witnesses and the police officers.

The Sheriff's findings are very peculiar, for he does not affirm—on the contrary he negatives—the pursuer's whole ground of action, as stated in Cond. 3. His findings are these—[*His Lordship quoted findings 2 to 7, supra.*] Now, all that is negative of the pursuer's case on record and affirmative of the defender's, and the Sheriff places his whole judgment on his last finding in fact, which is in these terms—"(8) But that it is not proved that the defender took sufficient precaution to avoid accident," and he therefore finds the defender liable in law, and assesses the damages at £50.

Now, I may say at once that I cannot assent to that ground of judgment. There is no doubt as to the Sheriff's meaning, for he explained it thus in his note—"But the one person on whom the law lays any responsibility for children let loose on a street is a driver, and he is bound to show that he could not by possibility have avoided an accident. I do not think that the defender has discharged that onus. He and his companion both say that he shouted, but though I believe them, I think it is clear that his shout was not attended to, and that he drove on, too much in the faith that the children would scatter before he came up to them. Though the immediate cause of the accident was latent, I cannot say that if the defender had exercised more caution and less faith, the regrettable consequence of that latent cause might not have been avoided, and I am therefore constrained to find him liable for the boy's death." If that view is right, then if in any case the parties renounced probation, and the fact that he had run over the child was admitted by the defender, then the defender would be held to be in fault, not because fault had been proved against him, but because he himself had failed to disprove fault. It is impossible to affirm that as a proposition either of law or of sound sense. It is certainly not the law that the only person on whom the law lays any responsibility for children let loose is the driver; there may be other persons.

Now, on the question how far the evidence affirms the pursuer's ground of action on record, I think that it is proved that the defender was the worse of drink, although

I do not think he was much the worse of drink. Probably the Sheriff describes the defender's condition with sufficient accuracy when he says—"All his friends who saw him drinking that day say he was, and I believe he was, at least as sober as most of them, and about as sober as any decent temperate farmer can be who is forced to transact business in public-houses on a market-day. Nothing that I saw or heard leads me to doubt the defender's respectability, or to find that there has been proved against him any fault but the one." I think that I cannot reject the evidence of the first three witnesses. and the police officers. The Sheriff says of these three witnesses — "I discard entirely the evidence of the first three witnesses. Neighbours who have not been examined in a criminal trial, and who are brought up in a subsequent civil case arising out of the same circumstances are seldom very reliable witnesses, and these three give such an incredible statement that I think their whole evidence worthless." Now, I must contrast that opinion with what the Sheriff-Substitute, in whose presence the witnesses were examined, says of these three witnesses in the passage which I have already read. "I believe the first three witnesses and I believe the police officers, and taking that evidence I arrive at the conclusion that the defender was the worse of drink, and was driving recklessly and carelessly, and not keeping a proper look-out, and that in consequence this accident occurred." From this it follows that in my opinion the defender must be held liable in damages for the death of this child.

Lord Trayner—I regard this case as one of difficulty. The evidence on some points is conflicting; the Sheriff and Sheriff-Substitute are not entirely agreed in their findings of fact, and I am not sure that I agree altogether with either of them. I am not prepared to hold that the defender was galloping his horse up Princes Street, as some of the witnesses say, and am disposed to think that he was not driving at any improper pace. Nor am I prepared to disregard, as the Sheriff does, the large body of evidence there is as to the defender's condition. That evidence may be exaggerated—probably is—but even subjecting it to a considerable discount, there remains evidence of a very sufficient character to the effect that the defender was not sober. He probably became more excited after the accident, which befel the pursuer's son, had happened, and this may account to some extent for the evidence, which I have said is probably exaggerated. The defender's sobriety or inebriety, however, is not the ground on which I proceed in coming to the conclusion that I have reached. Whether he was the worse of drink or not the defender would not be liable if the disaster occurred, as he represents, through the child's suddenly running in front of the horse or being suddenly dragged or pushed there by some one else, under circumstances which precluded the defender, although reasonably vigilant and careful, from pulling up in time to prevent injury. But I do not think we have a case of that kind before us. The defender saw the children playing on the street (according to his own account) when he was 12 or 15 yards off, and called out to them to give them warning of his approach. He does not appear at that time to have slackened his pace. The children continued "all in a row across the street" till he was within 3 or 4 yards of them, when some of them ran one way and some another, and the pursuer's child being the last in the row was knocked down and so injured by the defender's vehicle passing over him that he died shortly thereafter. Now, this account of the matter, which is the defender's own account, appears to me to establish that the defender was in fault. With these children "all in a row across the street" in his full view, I think the defender should have pulled up his horse and stopped altogether until he saw that the way was quite clear. I agree with what the Lord Justice-Clerk said in the case of *Clerk*, that "where a driver of a vehicle drives over a person in broad day light . . . there is the strongest presumption both in fact and in law that the driver was in fault." The occurrence in question did not occur in broad daylight; but there was light enough to enable the defender to see what was before him. The occurrence took place about 8·30 p.m. on the 26th April——that is, within an hour after sunset. The hour is well fixed by the evidence. The defender was at the Eagle Inn, in the Murraygate (where his horse was stabled), at 8 p.m. He stayed no longer than was necessary "to allow the hostler to yoke the trap," which may have been 15 or 20 minutes, and at a trot he could reach the scene of the accident in about ten minutes after leaving the Eagle Inn. This just brings us to 8·30, the time spoken to by the defender's witness William Anderson. Now, at that time there was still daylight, and whether it was much or little it was enough to enable the defender to see the children 12 or 15 yards ahead. I cannot, therefore, come to any other conclusion than that the defender was to blame for not pulling up or stopping altogether until he saw the way clear. What he did, however, was to continue on his way, in the expectation that the children would get out of the way before he reached them. This expectation was not realised, and the accident occurred. I think the defender must answer for it.

Lord Moncreiff—I agree in thinking that the Sheriff has arrived at the right result, but I agree in the criticisms of Lord Young and Lord Trayner on the grounds of his judgment. An accident of this kind might occur even with the most careful driver, and if the driver were sober and had proper control of his horse, that would go far to negative fault on his part. But in this case I find it difficult to disregard the evidence of no less than eleven witnesses, to the effect that the defender was not sober and had not proper control of his

horse. I therefore think that it is proved that he was in fault.

LORD JUSTICE-CLERK—Had your Lordships come to the conclusion that the pursuer had failed to prove the case of fault alleged against the defender I should have had no difficulty in concurring in that view. I think the case is one in which that result might quite well have been reached by anyone considering the whole case. But your Lordships have come to a different conclusion, and that practically disposes of the case, and my view is of no consequence to the result. I will confess that had I been placed in the position of disposing of this case alone and in the first instance, I would not have felt myself able to find that the pursuer's case had been proved. The facts as I gather them from the proof, rejecting such parts as are in my opinion not proved, are that the defender was driving at an ordinary pace along the street; that a number of boys had spread themselves across the street holding on to a skipping rope; that it being dusk, the rope was not visible until close up to it; that when the defender came almost opposite them he was so driving that none of the boys were in front of his vehicle, and he could pass them quite safely, and that unless something not to be reasonably expected had happened there would have been no danger, that what happened was that the boys at one end of the rope suddenly let go their hold, and as those at the other end were still pulling, the child that was killed was suddenly jerked in front of the defender's vehicle and was run over, the defender pulling up and stopping his horse so quietly that the wheel did not go more than a foot or a foot and a-half past the child. Such, as it appears to me, are the facts as to what happened, and I do not know of any other incident which is proved to have occurred at the time that can affect the question. Now, these points, if they constitute a true representation of the incidents, do not appear to bring out any fault attributable to the defender by anything that he did or omitted to do. If it could be said that he had not his horse perfectly under control that might have been sufficient, but the evidence led by the pursuer himself is, I think, conclusive upon this point. His horse must have been pulled up to a standstill in about 8 or 9 feet. At such a speed, if nothing sudden and abnormal happened, and which he could not anticipate, it is, I think, certain that no running over could have taken place. If the boy had moved in any ordinary way he could have pulled up quite well. If I thought there was evidence to prove that the defender drove at such a pace and in such a way that on coming near any person who in ordinary course of use of the road might get in his way so as to be injured, before he can pull up, then I think it would be quite right that he should be held responsible. My difficulty in the case is that I am satisfied that the defender, driving with proper control of his horse, drove on because those on the street were out of his way before he came up to them, and he was sure to clear them if nothing extraordinary and not to be contemplated happened, and that the coming of the boy into the way of the vehicle was caused, not by his moving himself, which if he did he would have been seen by the defender, but was caused by his being so suddenly jerked by extraneous force in front of the defender that he could neither swerve nor pull up in time.

It is said that the defender was drunk, and there certainly is a very large body of distinct evidence to that effect. Assuming it to be so, although neither of the Sheriffs hold that it is proved, it may tend to raise a prejudice against the defender, and it certainly would make it impossible to deal otherwise than most strictly with his conduct, and to require from him the strongest evidence to establish that everything he did was what a prudent and careful man would have done before it could be held that he had no responsibility for the accident. But here, upon the assumption of drunkenness, I think it very difficult to find any circumstances attributable to it which contributed to what happened.

As your Lordships are all agreed that the judgment pronounced should not be disturbed I shall not dissent from that conclusion. I agree that in such a case very little is sufficient to constitute fault. Your Lordships are satisfied that sufficient has been proved here to establish fault. All I shall say is that I have never seen a case decided in favour of a pursuer in which the evidence of fault was so narrow as it is in this case. I gather that your Lordships' view is that the defender should not have come up to the spot at such a speed as he was driving at, seeing there were a number of boys in front of him. I am not altogether satisfied that that is so, being inclined to believe that he had his horse under such control that he was prepared for all contingencies which a careful driver was bound to consider and be prepared for, and that before he actually came up, the road was clear in front. But I shall not dissent from the judgment proposed, although I have thought it my duty to express my doubts. I feel called on to notice one point in the judgment of the Sheriff-Substitute which tends to increase my doubt. The decision given by the Sheriff-Substitute is that the defender was driving fast, and that he pulled up his horse after passing over the child, and then backed it over the child, and then advanced over it a third time. These two findings seem to me to be self-contradictory. If he was going in any sense fast with a two-wheeled vehicle at the moment when the child was run over, what is described in the other finding seems to me to be impossible, unless it is to be held that the vehicle passed several yards beyond the child and was backed on to it again. I cannot on the evidence hold that any such thing took place, and the fact that the verdict expresses these contradictory facts as grounds of judgment increases my doubt as to its soundness.

I must further express my dissent from

the views expressed by the Sheriff upon the law of the matter. The statement that the one person on whom any responsibility for children let loose on a street is on a driver, and he is bound to show that he could not by any possibility have avoided an accident, is one to which I cannot assent in either of its branches. I am of opinion that in a case of this kind the pursuer cannot succeed by simply proving the accident and calling on the defender to prove a negative. I entirely agree with the proposition that in such a case the defender is exposed to a very strong presumption, and that very little in the way of proof of fault is sufficient to shift the onus, and to place a defender in the position of having to overcome the presumption against him. But to say that the law lays the responsibility of any such accident on the driver, and requires him at once to prove a negative, is to state what I hold not to be the law. A defender in such a case, as in all cases of injury said to be caused by negligence, is entitled to have the fault he is said to have committed specified and proved before a judgment can be given against him.

Reading the findings in the Sheriff's judgment, I am inclined to believe that if he had not taken this erroneous view of the law he would have assoilzied the defender, and I cannot say that in my opinion he would have been wrong in doing so.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Sheriff of Forfar dated 20th March 1899, as also the interlocutor of the Sheriff-Substitute dated 21st December 1898: Find in fact (1) that on the occasion specified in Cond. 3 the defender was in charge of a horse and dog-cart, and driving the same along the street; (2) that he was the worse of drink, and drove without due and reasonable care; and (3) that in consequence of his fault the pursuer's son James Symers Alexander junior, aged six years, was knocked down and run over by said horse and dog-cart, and so injured that he died on the following day: Find in law that the defender is liable to the pursuer in damages, and assess the same at the sum of £50 sterling, and ordain the defender to make payment of said sum with interest thereon at the rate of £5 per centum per annum from the date hereof till payment: Find the pursuer entitled to expenses in this and in the Inferior Court," &c.

Counsel for the Pursuer—Guthrie, Q.C.—A. S. D. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defender—Sym—A. M. Anderson. Agents—Mackay & Young, W.S.

Tuesday, June 27.

SECOND DIVISION.

CAMPBELL *v.* CAMPBELL'S TRUSTEES.

Marriage-Contract — Succession — Acquirenda—Legacy Designed to Exclude Marriage-Contract Trustees.

In an antenuptial contract of marriage, A, the wife, assigned, conveyed, and made over to the marriage-contract trustees any real or personal property which she should at any time become possessed of or entitled to (in the nature of capital but not in the nature of income) which should at any one time amount to or be equal in value to £100. A's sister by her will directed her testamentary trustees to pay one moiety of the residue of her estate to A "in sums not exceeding £95 at any one time," "at intervals of one month between each payment," for her sole and separate use, with a view to such sums being treated as sums coming at one and the same time to less than £100 in value, and expressed her wish and intention to the effect that the sums so coming to the wife under the will should be hers absolutely in her own right, and free from any settlement trust. The testatrix also directed that if her sister A died before all sums due to her under the will had been paid to her, the unpaid sums were to be dealt with by her trustees for the benefit of A's children, and failing such children should go to other persons mentioned in the will. The moiety of the residue amounted to £500 or thereby. *Held* that A was entitled to have this sum paid or conveyed to her in instalments as provided in her sister's will for her own use and behoof, and free of any claim therefor on the part of her marriage-contract trustees.

Mrs Montgomery Beatrice Campbell or Campbell, daughter of the late Patrick Campbell of Belmont, Stranraer, and Daniel William Campbell, merchant in Sydney, were married at Colombo, Ceylon, on and after 22nd February 1886. At the date of the marriage the parties were of Scotch domicile.

By antenuptial contract of marriage dated 22nd February 1886 the said Daniel William Campbell, on the one part, assigned and transferred to the trustees therein mentioned, and for the purposes therein mentioned, certain policies of assurance with profits and bonuses therein; and, on the other part Mrs Montgomery Beatrice Campbell assigned, conveyed, transferred, and made over to the same trustees certain shares in the National Safe Deposit Company, Limited, and also assigned, conveyed, transferred, and made over to the said trustees any real or personal property which she, the said Montgomery Beatrice Campbell, or the said Daniel William Campbell