the University exempted it from taxation; in *Sharp* v. *Parochial Board of Latheron*, July 12, 1883, 10 R. 1163, 20 S.L.R. 771, the Court suspended a charge on an assessment based on the valuation roll where it appeared that there had been by mistake a double entry in the roll, distinguishing between an error in the roll which it might be impossible to correct and an error in the assessment."

The Court pronounced this interlocutor—

"Finds (1) that the second section of the West Highland Railway Guarantee Act 1896 does not apply to the valuation by the Assessor of Railways and Canals appealed against; (2) that there is no relevant averment that the valuation is erroneous: Therefore refuses the prayer of the note, and decerns," &c.

Counsel for the Appellants — Cooper. Agent—James Watson, S.S.C.

Counsel for the Assessor — Younger — Lyon Mackenzie. Agents — Fletcher & Baillie, W.S.

COURT OF SESSION.

Saturday, November 7.

SECOND DIVISION.

[Sheriff Court at Dundee.

SNEE *v.* DURKIE.

Reparation — Negligence—Child Knocked Down in Street by Runaway Horse and Van — Proof — Onus — Presumption of Fault—Latent Defect.

Evidence upon which *held* (*diss.* Lord Young) in an action of damages brought by the father of a pupil child, who had been knocked down and injured by a runaway horse and van belonging to the defender, that the defender had successfully rebutted the presumption of fault attaching to an owner whose horse and van runs down a person in broad daylight in the public street, and that it had not been proved that the accident was due to any fault upon his part.

Opinions (*per* Lord Justice-Clerk and Lord Trayner) that if the accident was occasioned by some latent defect in the harness not discoverable by ordinary inspection the owner would not be liable.

This was an action brought in the Sheriff Court at Dundee by Patrick Snee, labourer, Dundee, as tutor and administrator-in-law of his pupil child Christina Snee, aged five years, against David Durkie junior, baker there. The action concluded for £250 as compensation for the injury caused to the pursuer's child, who had been knocked down by a runaway horse and van belonging to the defender in Loons Road, Dundee, on 9th February 1903.

The pursuer alleged as the causes of the accident that the horse was of a restive fiery nature; that the harness was inferior and flimsy, and consequently broke on the occasion in question; and that the driver of the horse and van had no skill or experience in the management of horses, and failed to adopt the usual and reasonable precautions to prevent the horse bolting.

The defender denied these allegations, and explained that the cause of the accident was the breaking of the back band and the fall of the van upon the horse's hind quarters, causing it to bolt, and that the breaking of the back band was due to a latent defect for which the defender was not responsible, which he could not have foreseen, and which was not discoverable on examination.

A proof was allowed, the import of which was as follows:—On the day in question the pursuer's van, which was a two-wheeled baker's van, was being driven downhill down Loons Road by Thomas Nannery, who had been one of the pursuer's vanmen for eighteen months. While going downhill the horse stumbled. The driver pulled it up. The back band of the harness gave way at the buckle hole. The harness was new, and had been purchased by the defender three months before the accident. The back band was three ply leather and was three-fourths of an inch thick and one and a half inches broad. When the back band broke the splash board of the van fell forward on the horse's hind quarters and caused it to bolt. The driver tried to turn it into a side street but failed. He then drove it into the wall at the side of the road, and the horse fell. The reins were tied round the left lamp-holder of the van, and that prevented the driver getting down on that side. He therefore jumped on to the wall and ran along it in order to get to the horse's head. Before he reached the horse's head the horse got up and continued its runaway course down Loons Road. At the junction of that road with Couper Street it knocked down the pursuer's child and broke her left arm.

Evidence was led for the defender to the effect that the horse was ten or eleven years old and a quiet animal. The maker of the harness deponed that the leather of the harness was of good quality, and that he had no reason to suspect any defect in it.

On 17th July 1903 the Sheriff-Substitute (J. C. SMITH) pronounced the following interlocutor:—"Finds that on or about 9th February 1903 Christina Snee, aged five years, a daughter of the pursuer, was in or near Loons Road, Lochee, knocked down by a horse and van belonging to the defender, and was severely injured, to the loss, injury, and damage of the said Christina Snee and of the pursuer: Assesses the damages at £35, for which decerns," &c.

In his note the Sheriff-Substitute said that no personal fault could be imputed to the defender, and that the driver did the best he could.

The defender appealed, and argued—No fault had been proved on the part of the driver. The Sheriff-Substitute himself

approved of his conduct. There was no suggestion in the evidence that the harness was of bad quality. It was proved to be new and good. The horse was proved to be old and quiet. The breaking of the back band, which caused the accident, must have been due to a latent defect. For this the defender was not to blame. The Sheriff-Substitute had not found that the pursuer was in fault—he had simply held him liable *ex dominio*. This was bad law. An owner was not liable for a latent defect undiscoverable by any ordinary or reasonable means of inquiry and examination—*Anderson* v. *Pyper & Co.*, March 18, 1820, 2 Murray, opinion of Lord Chief Commissioner Adam, at p. 270; *Francis* v. *Cockrell*, 1870, L.R., 5 Q.B. 501, opinion of Chief-Baron Kelly, at p. 508; Bevan on Negligence, ii. 1149.

Argued for the pursuer and respondent—He admitted that an owner was not liable *ex dominio*, and that the Sheriff-Substitute's judgment could not be supported as it stood. But where a horse, being driven in broad daylight, runs away and knocks over a child, the onus rests upon the owner of the horse to show that he was not in fault. Every set of harness ought to be constructed so as not to break under the strain caused by a stumble on the part of the horse. There was no evidence that the harness had been examined periodically before the accident, and in order to take the benefit of a plea of latent defect the defender must show that he had made a reasonable examination of the harness. Otherwise he could not contend that the defect was undiscoverable. The evidence also showed that the driver was in fault in tying the reins to the lamp-holder of the van. This prevented him getting down on the near side of the horse and holding on to the reins till he reached the horse's head. The defender had therefore not discharged the onus of showing that he was not in fault.

LORD JUSTICE-CLERK—This case is in a somewhat peculiar position in respect that on neither side of the bar is the interlocutor of the Sheriff-Substitute upheld. That interlocutor does not settle the true question in the case. That question is—On the evidence has the defender been found to be in fault? On a careful consideration of the proof I am unable to find any evidence that would justify such a verdict. I take this view while quite recognising that in a case where a child is run down in broad daylight by a van the case will start with a presumption against the owner of the van.

The accident happened in this way. While going downhill the horse stumbled. The driver pulled up. The backband gave way on account of the jerk caused by the horse recovering itself. The splashboard falling on the horse's hindquarters frightened it and it ran off. The driver did his best to stop it. He drove it into a wall and the horse fell. The driver then ran along the wall in order to get to the horse's head before it rose. I am satisfied from the evidence that the driver did not go into the field, but ran along the wall. He was unable to get to its head in time, and the horse bolted and ran over the child,

It is now contended for the pursuer that the van should have been provided with a brake. But this is a light van with two wheels, and we all know that it is not usual to provide such vans with brakes. And it is remarkable that the want of a brake is not made an allegation of fault on record.

As to the horse, it is shown to have been an old horse and absolutely quiet, and never to have shown signs of restiveness.

Was there any fault in the harness? It was new, the leather was of good quality, and the maker to whom it was sent to be repaired after the accident says that the leather was quite fresh and sound when he repaired it, and that he was surprised that the accident should have happened.

In these circumstances I am quite unable to attribute the accident to any fault on the part of the owner of the horse and van. I think that the defender has succeeded in showing that the accident was caused by some latent defect in the harness.

I therefore would propose to alter the judgment appealed against, and assoilzie the defender, on the ground that the proof discloses no fault on his part.

LORD YOUNG—The view which I take in this case is short and simple. I think that we may all assume that a baker's van may be driven along the streets of a town with safety to the public. On the occasion with which we have now to deal a horse and baker's van got out of the control of the driver. It is said that the horse stumbled when going down a hill, and that either as the cause of the stumble or in consequence of it the back band broke, with the result that the horse got out of the control of the driver, and dashed along the street, knocking down the pursuer's child and breaking the child's arm. I think that when a calamity of this kind occurs the presumption is against inevitable accident. I think that the owner of a tradesman's van is responsible for the accident unless he can show that it was unavoidable—that is to say, unless he can show that no care on his part could have prevented it. I do not assent at all to the proposition that it is for the person injured, or the parent of the child, to investigate the history of the case in order to show that the accident was due to some fault on the owner's part or on the part of his servant. I think that it is for the owner to show that there was no fault on his part—that the accident could not have been avoided by care on his part. On the evidence which we have here before us I am not satisfied that the accident was unavoidable. The defender has in my opinion failed to prove that the accident was unavoidable, that it could not have been prevented by the exercise of due care on his part, and having failed to prove that he is in my opinion responsible.

LORD TRAYNER—I concur in the judgment proposed by your Lordship in the chair.

The counsel for the pursuer admitted that he could not support the Sheriff-Substitute's judgment on the grounds set forth in the Sheriff-Substitute's note. I agree with him. For the only ground put forward by the Sheriff-Substitute on which he has affirmed the defender's liability is that he is the owner of the horse and van that did the damage complained of. Now, no claim of damages can be based on ownership *per se*. There must be added some fault on the part of the owner —some fault arising from act or neglect on his part. This I say while recognising that in most cases where a person is run down in a public street in broad daylight the onus of showing that he was not at fault will be upon the owner of the horse. The presumption of fault is strong but may be rebutted.

In his condescendence the pursuer sets out various grounds of fault. He says that (1) the driver was inexperienced and incapable of controlling the horse, (2) that the horse was of a restive fiery nature, and (3) that the harness was of an inferior and flimsy kind. The Sheriff-Substitute does not affirm any one of these allegations, and they are one and all negatived by the proof. The presumption against the defender has been successfully rebutted. The proof shows that the accident to the pursuer's child happened without the existence of any fault on the part of the defender or his servant. Your Lordship has already pointed out from the proof what led to this regrettable accident, and I need not repeat what your Lordship has said. I will only add that if the accident was occasioned by some latent defect in the harness not discoverable by ordinary and usual inspection, the defender would not be liable for the consequences of such defect. I think the appeal should be sustained and the defender assoilzied.

LORD MONCREIFF — I agree with the majority of the Court that the interlocutor of the Sheriff-Substitute should be recalled. Neither in his interlocutor nor in his note does the Sheriff-Substitute find fault on the part of the defender proved. On the contrary, it appears from his note that he is not prepared to find fault proved.

I am quite willing to take the case on the footing that the pursuer having established that the accident occurred in broad daylight the onus is shifted to the defender to prove that he was not in fault. Taking the case on that footing I am prepared to hold that the defender has made out that there was no fault on his part.

I could have imagined a case on the footing that there was fault in driving a loaded van downhill without a brake. But no charge on this head is set forth by the pursuer on record, and no evidence was led on the point.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor appealed against: Find it has not been proved that the accident complained of was due to any fault on the part of defender: Therefore assoilzie the defender from the conclusions of the action, and decern."

Counsel for the Pursuer and Respondent —W. Mitchell. Agent—Alexander Bowie, S.S.C.

Counsel for the Defender and Appellant —Salvesen, K.C. —T. B. Morison. Agent —R. S. Rutherford, Solicitor,

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Tuesday, November 10.

FIRST DIVISION.

[Lord Low, Ordinary.

LANARKSHIRE STEEL COMPANY *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Rates of Carriage—Increase of Rates—Increase of Rates found Unreasonable by Railway Commissioners — Recovery of Increased Rates Paid Under Protest—Condictio Indebiti—Action for Recovery by Trader who has not Applied to Commissioners—Jurisdiction—Railway and Canal Traffic Act 1888 (51 *and* 52 *Vict. c.* 25), *secs.* 10 *and* 12—*Railway and Canal Traffic Act* 1894 (57 *and* 58 *Vict. c.* 54), *sec.* 1 (1), (3), (5).

Certain railway companies jointly issued a notice intimating an increase of rates for the carriage of coal. A steel company whose works were served by one of these railway companies objected to the increase of rates as being unreasonable, and demanded that it should be withdrawn. The railway company, however, rendered their monthly accounts for carriage to the steel company upon the basis of the increased rates. The steel company paid the accounts as charged under protest, and, as they alleged, upon the understanding that their right to claim a rebate for the increase should not be prejudiced, and that, if ultimately it should be found that the railway companies were not entitled to increase the rates, the increased charges should be returned. The steel company did not lodge a complaint in respect of the increase of rates with the Railway and Canal Commissioners, but seven companies which were substantially *in pari casu* with the steel company lodged such complaints, with the result that in October 1901 the Railway and Canal Commissioners found in the case of each of the seven complaints lodged that the increase in the rates was unreasonable, and directed the railway companies to discontinue to charge the increased rates. In consequence the railway companies ceased to charge the increased rates. The steel company alleged that they had not proceeded with their application to the Commissioners in reliance on representations by the defenders that their claims would not be prejudiced in consequence.